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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1358

MARY ELLEN COAKLEY, *Petitioner,*

v.

F. M. REISING, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE 13TH COURT OF CIVIL APPEALS OF TEXAS

ORRIN W. JOHNSON
Attorney for Petitioner,
130-38 Texas Reserve Bldg.
Harlingen, Texas 78550

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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When a subdivision of State government permits private persons to covertly instigate, pay for and use public foreclosure power to seize for themselves another man's land in the absence of fair notice, hearing and an equal right of tax settlement afforded the landowner, such foreclosure conflicts with the due process of law clause of the Fourteenth Amendment of the United States Constitution and is invalid.

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When a taxing body appears as Defendant in a foreclosure suit in which a person is named as owner of the land in question, it has notice of his claim of title and cannot consistently with due process of law foreclose and take such land without also giving fair notice and hearing to him or his heirs.

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Mary Ellen Coakley, hereby petitions for a Writ of Certiorari to review the decision of the Texas Court of Civil Appeals, sitting at Corpus Christi, declaring valid a certain tax foreclosure judgment which fulfilled and consumated, through a taxing body's statutory foreclosure powers, two covert, champertous agreements entered into between the taxing body and Respondents, Reising and Conklin, to foreclose upon and sell a non-resident landowner's property to them, all without any

notice or hearing to the owner, or any equal opportunity granted him to settle taxes and acquire a tax-free title to the land.

Opinions and Judgment Below

The majority and dissenting opinions below are reported at 457 S.W.2d 431. The opinion of the Supreme Court of Texas on an earlier appeal is reported at 436 S.W.2d 315. They are appended hereto as Appendices A and B, respectively, at pp. 25 and 38. The Trial Court's judgment, adverse to Petitioner, is subjoined as Appendix C at p. 48.

Jurisdiction

The judgment and opinion of the Court of Civil Appeals, subject to review, was made and entered on July 23, 1969. This decree is that of the highest Court of Texas for jurisdictional purposes. *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157. The motion for rehearing to that Court was overruled on August 27, 1970. Her Application for a Writ of Error was filed in the Supreme Court of Texas on September 23, 1970. It was refused on November 4, 1970, with the notation "No reversible error," indicating that the Court was not satisfied that the opinion of the Court below in all respects has correctly stated the law, but was of the opinion that the application presented no error requiring reversal. See Rule 483, Texas Rules of Civil Procedure, Statutory Appendix, p. 59. Appellant's Motion for Rehearing was overruled by the Supreme Court of Texas on December 2, 1970. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. Sec. 1257(3).

Questions Presented for Review

1. Whether due process of law and equal protection of the laws as required by the Fourteenth Amendment to the United States Constitution is accorded to a non-resident landowner in a tax foreclosure proceeding based upon mere service of an uninformative foreclosure suit notice upon prior owners of the land when the foreclosure was indisputably shown to be the consummation of certain subrosa, champertous agreements under which a Water District subdivision of the State had covertly agreed with third parties (Reising and Conklin) to settle taxes in their favor and (at their expense) to foreclose upon and sell the land to them and no notice of or hearing concerning these private arrangements was ever given to any owner of the land or any similar opportunity granted him to settle taxes and secure a tax free title on the land?

2. Whether a foreclosure decree is consistent with the due process of law required by the Fourteenth Amendment to the United States Constitution under which a Water District foreclosed for taxes upon the land owned under an unrecorded deed by one J. M. Collins without joining Collins (or his heirs) as party to its foreclosure suit and giving due notice thereof, when the same District was then appearing as defendant in another tax foreclosure suit by another taxing body which, in its petition, named Collins a defendant and alleged him to be an owner of seven tracts, including the three here involved?

Constitutional Provision Involved

Amendment XIV, United States Constitution, Section 2, Sentence 2, ". . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

The essential question presented here concerns the validity under the due process clause of a champertous tax foreclosure based upon covert arrangements between a taxing unit and certain strangers to the title. The resolution of that question in this case has considerable to do with how we may lawfully run the governments of these United States under our constitutional system.

These are statutory trespass to try title suits filed in 1947 by Petitioner against Respondents for three tracts out of the so-called "J. R. Page Estate lands" in Hidalgo County, Texas. Petitioner's title rests upon a Will and a chain of Deeds. Respondents are the purchasers (and their *pendente lite* assigns) from Hidalgo County Water Control and Improvement District Number One, claiming their title through a tax foreclosure sale of these lands which is challenged here. We refer to the Texas record as "SF" for the Statement of Facts, with "X" added for the Exhibit volume, and "Tr." for the transcript.

J. R. Page died in Kansas City in 1934 owning the three tracts in dispute, amounting to 112 acres, as well as other Hidalgo County, Texas, lands (SF 58; X 102-5; 302; X 149). His widow (joined by a new husband) and two sons sold all the lands on March 24, 1941, to J. M. Collins who did not timely record his deed (SF 70-74; X 024).

Collins, an old Kansas City real estate man, was then heavily in debt to Mrs. Coakley, a widow of that city (SF 82-3; X 037-38). Although Collins' deed was unrecorded, the Tax Collector for the State of Texas apparently knew of his ownership because on July 12, 1941, the Assessor sent him statements for the delinquent taxes on the Page lands (X 157-63; SF 420). Then on December 22, 1941, the State of Texas sued Collins to foreclose its delinquent taxes on seven parcels of the Page lands, including the three here in question (SF 311-12; X 165-99). The Texas procedural rule then in force required that the petition contain ". . . a short statement of the cause of action *sufficient to give fair notice of the claim involved.*" See Texas Rule of Civil Procedure 47, Statutory Appendix, p. 59. Giving his correct address in its petition, the State alleged that Collins was an "owner" of all the parcels along with Page's widow, her new husband, and the two Page sons. Another person, Hayes, was also alleged to "claim some interest" in the property.

The Water District—a different taxing body—was also joined as a Defendant by the State in its tax suit. This District appeared therein and acknowledged receipt of the Petition by an instrument filed by its General Counsel, Haigh (SF 301), on January 7, 1942 (SF 285; X 171-72; 197 Par. 2). The appearance was sworn to before the District's Land Commissioner, Abney, who had authority in tax matters (SF 297-301; 262-63; 316; 418; X 136-141). The District, however, does not appear to have attempted any inquiry whatsoever respecting Collins' alleged ownership in the land. It remained an active Defendant (and Collins continued to be named as a Defendant-Owner) in this State tax foreclosure suit until Sep-

tember 6, 1943—embracing all the material times here in question.

Collins, however, had died on January 27, 1942, while the State's suit pended (SF 79; X 081). He had devised his property to his cousin, William Collins, an Iowa farmer (X 029, 116). Considerably later, on June 26, 1943, the cousin quit-claimed the lands to Mrs. Coakley in cancellation of J. M. Collins' debt to her (SF 105; X 087; X 056-58; SF 160). She probated the will in 1943 (SF X 037) and stands in William Collins' shoes for our purposes here (SF X 087).

While the State suit was still pending, and on May 29 and June 26, 1942, respectively, Conklin and Reising made champertous, covert agreements with the District to foreclose upon and sell the three parcels of land to them (SF 275; X 201-10). A copy of one of these is subjoined as Appendix D at p. 57. Reising and Conklin, it seems, were both local residents and apparently friends of the District's officials. Conklin was on a first-name basis with Abney—the Land Commissioner, who was in charge of tax matters (SF X 210). Abney's department was in fact then handling the renting of lands, including these (SF X 164; X 147), as agent for the non-resident owner and for a fee (SF 252; X 137-9). Reising at the time was the employer of Respondent, Rogers (SF 349-50), who later became an officer of and an owner of Reising's company, a corporate Respondent herein (SF 363-65; X 111). Rogers was well connected locally—the son-in-law of the Water District's Manager, Haven (SF 293-4).

These agreements provided that the Water District would undertake ". . . *to settle* . . ." the then delinquent taxes

at about ten cents on the dollar (SF 420, L 23-24) or $15.00 per acre for Conklin (SF X 209) and $20.00 per acre for Reising (SF X 202-3).

In their agreements, Conklin and Reising posted cash deposits ". . . *as part payment for the Water District's interest in the above described tracts* . . ." and further agreed to pay ". . . *any court costs and attorney fees which may accrue through the Water District's efforts to secure title to this acreage through Flat Rate foreclosure.*" (SF 275; X 204, SF 276, X 206). No similar dispensation was accorded to, or even offered to William Collins who owned the land through an unrecorded deed. None, indeed, was offered to the Page family who—although they had sold the land more than a year previously—still appeared to be its owners according to the Deed Records. In fact, the District and Respondents kept the secret of these arrangements so well that Petitioner did not learn of the same until her counsel discovered the written records revealing the facts among the District's old files on May 18, 1966, on the final day of a second trial of these old cases (SF 238-39; 314).

Collins, however, made a trip to Texas and to the District's office about July 1, 1942, to investigate his inheritance (SF 144-46). The Courts below did not find this evidence sufficiently conclusive in itself to give notice to the District of Collins' ownership as a matter of law. However, there is no evidence or claim that Collins or, for that matter, any of his predecessors in title were ever notified of the champertous arrangements which had just been concluded with Reising and Conklin, or of an equal opportunity granted him to settle the taxes on the property on terms equally favorable.

On August 14, 1942, the District commenced the challenged tax foreclosure suit in conformity with the champertous agreements. It named only the Page family—the prior owners—as parties-defendant (SF 207; X 249) and claimed assessments of about $52 per acre were due on the land to this particular taxing unit. Nothing in the citation (SF X 257-58) or petition (SF X 247-50) would give the slightest hint to the alleged landowners-defendants that taxes due *all three* taxing units could be—and in fact were being—settled for a third that amount in favor of third parties. William Collins, the true owner, was never joined in or notified of this suit, although his son testified that he had been in the District's office shortly before that time explaining his inheritance and inquiring about settling his taxes on these Page lands (SF 144-160). Judgment of foreclosure was entered on October 21, 1942, solely against the Page family (X 231), and all three parcels (worth $100.00 per acre, according to some testimony, SF 449-450) were struck off to the District for the total sum of $100.00 (SF X 237). Shortly thereafter, with taxes settled, they were deeded to Reising and Conklin as per their contracts (SF X 241-244).

The formalized pleadings in Texas trespass to try title suits do not require specifications of grounds. See, Rules 783, 788-89, Texas Rules of Civil Procedure, Statutory Appendix pp. 59-60. Moreover, Texas follows the fundamental error rule permitting the Appellate Courts, without assignments of error, to consider matters in which the public interest is adversely affected, including constitutional issues. *McCauley v. Consolidated Underwriters,* 157 Tex. 475, 304 S.W.2d 265 (1965); *State v. Santana,* ____Tex.____, 444 S.W.2d 614 (1969); *Boykin v. Alabama,* 395 U.S. 238. However, this record affirmatively

shows that Petitioner continuously attacked the constitutionality of the foreclosure judgment, relied upon by Respondents, on the ground that it was inconsistent with due process of law. Petitioner objected to all of Respondents' defensive issues Nos. 10-18 against her title as being without evidentiary support (Tr. 358-71). Specifically, Petitioner objected, in each case, that the ". . . transaction under which the purchasers attempted to acquire the title was void for illegality . . ." being champertous (Tr. 358-71) and that Respondents ". . . are not shown to come before the Court with clean hands . . ." (Tr. 359-71). Then as to an issue asserting, for example, Respondents' claim of "innocent purchase," Petitioner further objected (See Exception VI F. Tr. 358) as follows:

> "F. The issue is not raised by the evidence in the light of the fact that the landowner in question was not duly served, was not duly made a party to the flat rate foreclosure suit in question, nor served with process herein, and the landowner has a constitutional right under the Fifth and Fourteenth Amendments of the United States Constitution to notice, and statutes of Texas provide how such notice shall be given, and the failure on the part of the district to give such notice is the issue in point, not whether or not the landowner remained silent in the light of the fact there was no duty on the part of the landowner to say anything until the constitutional duty of the district had been carried out."

Objections in like wording were interposed to Respondents' later defensive issues (VIII F. Tr. 362 and IX Tr. 364).

The due process objections were supplemented by further objections in a Motion for Judgment N.O.V. (See,

for example, No. 2 (1) Tr. 373). Here, again, the Petitioner spelled out at length the evidence concerning the mooted champertous arrangements in connection with her exceptions (Tr. 373-77).

Objections to the overruling of each such exception was again preserved, in each instance, by separate assignments in the Motion for New Trial against Respondents' judgment (Tr. 393-434). This Motion again amplified the due process objections with further grounds, such as (Tr. 429):

> "The Court erred in sustaining Defendants' claims (under the Jury's answers to Issues 14-18) that Plaintiff is estopped by silence to assert that the foreclosure judgment in Cause No. B-13,329 and subsequent deeds of January 7, 1943, to District #1, January 28, 1943, to Reising, and January 28, 1943, to Conklin are invalid as to her inasmuch as there is insufficient evidence, under the facts of this case, disclosing a duty on the part of the Plaintiff, or her predecessors in title, to assert their claim of title to Defendants in the absence of any showing that Plaintiff, or her predecessors, were afforded the essentials of due process of law in Cause No. B-13,329; i.e. were named as parties in the suit, were granted fair notice by citation in such suit, and were given a fair opportunity for hearing in Court, and any such finding of 'duty' would be against the great and overwhelming weight of the evidence."

Upon appeal to the Court below, the objections were listed as bases ("germane" to) Petitioner's Points of Error. In abbreviated form, the material portions of which (for our purposes) were:

"THIRD POINT

"The Trial Court erred in denying Plaintiff's Motion for Judgment N.O.V., holding that the District's foreclosure sale was legal and valid against Plaintiff's chain of title despite the undeniable facts . . . (2) that the sale was a consummation of champertous agreements under which the Defendants, Reising and Conklin, themselves unlawfully contracted that the lands would be foreclosed upon and sold to them, paying in advance the costs and legal fees of the intended seizure.

"(Germane to Assignments of Error 58-62, 73-77, 4, 42-53; Tr. 410-33).

"FOURTH POINT

"The Trial Court erred in submitting, over objection, Defendants' Issues 10-18 and sustaining its findings by judgment on the purported equitable defenses (i.e. bona fide purchaser for value in good faith without notice, estoppel by silence) when the undisputed evidence showed an unlawful and invalid transaction . . .

"(Germane to Assignments of Error 42-53, 58, 60-62, 73-77; Tr. 410-34.)"

Under Texas practice the assignments of error in the Motion for New Trial need not be copied into the brief and may be cited by reference only, as was done here. They are considered along with the argument on brief to determine the question of reversible error. *Biggers v. Continental Bus System,* 157 Tex. 351, 303 S.W.2d 359, 368 (1957); *Fambrough v. Wagley,* 140 Tex. 577, 169 S.W.2d 478, 482 (1943). Petitioner's briefs, both in the Court of Civil Appeals and in the Texas Supreme Court, are submitted with this record. Extracts are quoted hereafter

at pp. 15-18. In them, Petitioner continued to assert her due process objections to the foreclosure proceeding.

A copy of Petitioner's Motion for rehearing is also included in the record. The Court will observe that here, also, Petitioner continued to preserve her due process objections by excepting to the overruling of her Points of Error.

The Court of Civil Appeals in its opinion did not expressly pass upon the constitutional issues, though, of course, could not have affirmed the decision below and held the foreclosure sale to be valid without resolving the constitutional issues against the Petitioner.

POINT ONE

When a subdivision of State government permits private persons to covertly instigate, pay for and use public foreclosure power to seize for themselves another man's land in the absence of fair notice, hearing and an equal right of tax settlement afforded the landowner, such foreclosure conflicts with the due process of law clause of the Fourteenth Amendment of the United States Constitution and is invalid.

ARGUMENT UNDER POINT ONE

In these cases Petitioner's able former counsel—through absolutely no fault of hers—were not as diligent as they might have been in resisting the pleas of the Defendants that "the case be continued," (R. Tr. 63; 88). In fairness to them, however, Petitioner, an aged widow, did not learn the true facts of this case until May 18, 1966. This was at the end of a second trial when her counsel found old records in the Water District's files which unquestionably

proved that Respondents instigated, paid for and secretly used the foreclosure powers of the Water District to seize this land for themselves.

Thereafter, in three opinions, 422 S.W.2d 502, 436 S.W.2d 315 and 457 S.W.2d 431, the Texas Courts decided many things—but never once came to grips with the real issue in this case. The essential question—not previously decided by this Court—is this:

When a taxing body has made the kind of champertous and secret tax settlement agreements with strangers to the title which is here involved, all without any kind of notice, hearing or equal settlement rights granted to the landowner, does the uninformative suit notice later served upon *prior owners* in the formal foreclosure suit (filed to enforce the agreements) really satisfy the requirements of due process for equal protection to the landowner inherent in the Fourteenth Amendment?

Does not notice—if it is to be *fair*—require that the landowner be fairly informed of what the transaction really is in order that he may exercise an informed judgment in protecting his rights? After all, he might want to settle his taxes at $15 per acre, too—if he knows it could be done.

May public power be covertly purchased and used with impunity by private persons—as in reality it was here—to seize another's land? Are the superficial trappings of public process of themselves enough to create a valid foreclosure judgment for Respondents when, in its true substance, this proceeding was not really a public sale at all—and no fair notice or equal rights were afforded to the landowner?

Are persons who participated in and bought another's land under covert, illegal arrangements such as these, entitled to be thereafter protected by the Court in their acquisitions under equitable doctrines of "bona fide purchaser for value in good faith" and "estoppel by silence" as against the landowner from whom the real arrangements were concealed for more than twenty years? Does equity somehow bar the disadvantaged landowner from a remedy against such covert arrangements even after he discovers them?

In this case, by forced sale, Respondents now claim to have validly purchased the lands of a non-resident heir who was not accorded even the rudiments of fair notice and due process. This was Collins' land. But *only Respondents* were granted the right to settle taxes and purchase the property for a minor sum. The non-resident, according to the District Manager's own testimony, was left with the discouraging impression that the land ". . . was not worth fooling with. There was more taxes against it than the land was worth." (SF 342). Obviously, this Collins didn't know and wasn't told that taxes could be settled for a song and that this had already been done to the advantage of two strangers to the title. No attempt was ever made to give Collins (the owner by unrecorded deed) or even the Page family (the owners on the record) an equal chance to settle taxes—even though this land was theirs and the District was aware of the fact. Is this equal protection of law?

The holdings of the Texas Court is that mere notice served upon prior owners in the superficial formal judicial proceeding—which was a puppet-show foreclosure—satisfied the due process requirement of fair notice to the

landowner. This holding ignores the fact that no one—not the Page family or anyone else save Respondents—was ever given notice of the actual champertous foreclosure arrangements under which taxes were to be settled and the title was to be seized. Nor was any other living person offered a like opportunity to settle taxes and obtain a tax-free title on the land for a song. The antipode of notice, this was unquestionably shown to be a secret private deal for the benefit of strangers to the title. Is this fair notice and due process of law?

The Texas Court held that champerty *per se* did not vitiate a tax sale. See Article 430, Texas Penal Code, Statutory Appendix p. 62. Perhaps this is correct as an abstract proposition. But where the champertous arrangements were, in fact, secretly done and were long concealed from the landowner (and even the prior owners who still held the record title), where no equal right was granted them to clear their land of taxes for a token sum, the use of public power was an abuse of public power and due process was denied the landowner. Involved here, also, is the question of equal protection of the law for ". . . the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive." *Bolling v. Sharpe,* 347 U.S. 497. We cannot state the matter with greater clarity than the way it was stated, on brief, to the Court below.

> "Worse, this whole transaction was illegal from the outset.
>
> . . .
>
> "What we are saying is that this business of prearranging and financing by Defendants of the tax

foreclosure by a municipality of another's land is —and should be—against public policy. . . . Apart from any invalidity which is inherent in such a procedure arising out of the more commonly raised grounds, such a stifling of bidding or gross inadequacy of price, *Miller v. Leary*, 245 S.W.2d 980, 981 (Tex. Civ. App. 1952) (Syll. 3); *Slater v. Maxwell*, 6 Wall. 268, 18 L.Ed. 796, 799 (1868); or the vitiating taint of champerty of such an agreement or deed, *Jamieson Coal & Coke Co. v. Goltra*, 143 F.2d 889, 154 A.L.R. 1191, 1201 (8th Cir. 1944); there is a yet more fundamental reason why these foreclosure proceedings do not validly cut off Plaintiff's chain of title.

"Where public power is exercised, it should be axiomatic that it be fairly exercised. The District was renting Collins' land in 1942 and collecting a fee for doing so. Certainly it owed to the landowner some sort of fiduciary duty here. 2 Tex. Jur. 2d, 'Agency,' § 111, p. 557. There is not the slightest indication here that the District made the slightest attempt to notify him—or whoever they believed the land belonged to—of their intention to sell it out from under him to some strangers. Nor does any evidence suggest that the non-resident hog farmer, Will Collins, ever had a fair chance to settle his taxes with the District on the same cheap basis that Reising and Conklin—friends of the District's officials—had. Every indication is otherwise. The District seems to have peremptorily awarded his land, without prior notice, to complete strangers to the title while the perfectly ethical and lawful State foreclosure suit yet pended.

"There was no real constitutional process followed in Defendants' flat rate foreclosure here—only the external trappings of one. With one tax foreclosure suit pending, there was no honest need in order to foreclose to have a second suit—except to specifically favor Reising and Conklin, under their contracts, with these particular lands. They plainly and obviously instigated this particular suit and covenanted to pay the costs and legal expense incurred in seizure of title, knowing in advance that these lands belonged to somebody else.

"They didn't even show up for the flat rate sale (if there really was one) when the Constable struck off the land for $100.00. Why should they? They already had the land bought—and had friends within the District who could see that the deal stuck.

"Certainly such a scheme is repugnant to public policy. Such a sale violates fundamental concepts. We read in Article VIII, Section 1, of the Constitution of Texas, 'Taxation shall be *equal and uniform.*' It is scarcely that when a municipal corporation covertly agrees with a complete outsider to settle taxes and sell one's land for a fraction of its value, without giving full and fair advance notice and disclosure and without the same offer to the landowner for whom the District was then acting as agent in renting the land. Such a sale is contrary to the essence of our whole system of due process—which is based upon equal protection of law and upon notice and simple fairness. Commentary, 4 Vernon's Texas Constitution, p. 447. Equal protection means protection against improper or discrimi-

natory administration of law. 16 Am. Jur. 2d, 'Constitutional Law,' § 540-41, p. 929-30.

"As stated by the Supreme Court of the United States in *Mendenhall v. Hall,* 134 U.S. 559, 33 L. Ed. 1012, 1016 (1890):

" 'But no government will permit its machinery, constructed to enforce the payment of public dues to the fisc, be used to manipulate a fraud, and if the purchaser is a party to the fraud he must share its punishment.'

"Or, as also stated by that Court in *Slater* at page 799 (underscoring ours):

" '*It is essential to the validity of tax sales,* not merely that they be conducted in conformity with the requirements of law, but *that they should be conducted with entire fairness.*'

"To sanction and validate this sort of a transaction with a public corporation obviously opens the door to every kind of nepotism and abuse of power by public officials. It would be a simple *carte blanche* to manipulation and the use of public power to seize land for friends without regard to notice and constitutional process."

This Court has said, *Chicago B. & Q. R. Co. v. Chicago,* 166 U.S. 226, 235:

"In determining what is due process of law regard must be had to substance, not to form."

If notice and hearing are required by due process of law in equalizing assessments of taxes, *Turner v. Wade,* 254 U.S. 64, 70, then why does not due process also require notice and hearing to a landowner if a tax settlement agreement is being made in favor of strangers to the title which clears the title to them for a minor fraction of the amount of taxes assessed against the land? The relief from taxes is just as important to a citizen as the imposition of them.

If equal protection of the law requires *de facto* equality and lack of discrimination in fixing rates between different companies, *Raymond v. Chicago Union T. Co.,* 207 U.S. 20, 37, then how can the present transaction be consistent with equal protection of the law when strangers to the title are offered a tax settlement—and a man's property—with no equal offer made or even conveyed to the landowner? As this Court has said in *Yick Wo v. Hopkins,* 118 U.S. 356:

> "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The sale in question was fundamentally illegal. The Jury upheld the Defendants' defenses that each was "an innocent purchaser in good faith for value without notice" and that the Plaintiff was estopped to assert her title when they should have asserted their interest in the land. The

Court below, it appears, did not go along with the second "equitable" defense. Justly so—for the record is devoid of any evidence to support it, and Texas law does not permit estoppel as a method of passing title, even where estoppel facts exist. *Simonds v. Stanolind Oil and Gas Co.*, 134 Tex. 332, 114 S.W.2d 226, 235. The legal action used here permits a defendant to recover damages for any improvements he makes, if the plaintiff prevails. Texas Rules of Civil Procedure 806-7, Statutory Appendix p. 61. Thus, the defendant is "made whole" even if he loses and no occasion exists for equitable intervention.

But the Court below seems to have regarded the Trial Court's Judgment as correct on the theory that Reising and Conklin were "innocent purchasers." This was a legal and equitable impossibility. Reising and Conklin were parties to the champertous agreements—to the transaction which made the proceeding illegal. As this Court has explained in *Mendenhall*, there is no equitable basis for permitting a party to make profit by his own illegal acts.

We live in an era of change. Many of our younger citizens question as shibboleths our declarations respecting "fairness" and "equality" in the administration of government. Some despair of change within the "system." The basically unfair and unequal treatment accorded to an unlettered non-resident farmer by this District in its tax settlement-foreclosure arrangements is a clear example of denial of due process and equal protection. This Court should reverse the decision below which ratifies and judicially sanctioned this sort of an underhanded foreclosure proceeding as consistent with Fourteenth Amendment requirements.

POINT TWO

When a taxing body appears as Defendant in a foreclosure suit in which a person is named as owner of the land in question, it has notice of his claim of title and cannot consistently with due process of law foreclose and take such land without also giving fair notice and hearing to him or his heirs.

ARGUMENT UNDER POINT TWO

In this case, at all times in question the Water District was appearing as Defendant in the State of Texas tax foreclosure proceeding. It acknowledged the State's Petition which listed Collins (along with several others) as an owner of seven tracts, including these three. During the pendency of this suit the District attempted to foreclose without joining Collins or his heirs (who, since he had died, were subject to being joined, if really unknown, under Rule 111 of the Texas Rules of Civil Procedure). See Statutory Appendix, p. 62. The end result was that Collins and his heir, William Collins, lost their land without any notice of the suit.

Under Texas Rules, the purpose of a pleading is to put each party on notice of the opponent's claims. *Glenn v. Dallas Co. Bois D'Arc Island Levee District,* 114 Tex. 325, 268 S.W. 452, 453 (Comm. App. 1925). Indeed, parties are presumed to know what the Court records say. *Watrous v. Rodgers,* 16 Tex. 411, 412 (1856).

One cannot deliberately blind oneself to the known allegations of ownership set forth in a suit by another taxing body, ease through a foreclosure proceeding without making inquiry of the ownership shown and attempt

to alibi away non-joinder of the owner and due process of law when complaint is made about this action. In this case, the Court below drew the conclusion that the fact that Collins was out of possession (by then he was dead) and there were no allegations of a claim of title by any specific Defendant to any specific tract, excused the District from naming him or his heirs as Defendants and giving them notice. This holding has no legal authority to support it, and none is cited. Obviously, one can give another notice—as by a pleading—without being in possession of land. Of course, the allegations did not list separate owners for each named Defendant as to each tract. All tracts passed by a single deed and Collins was listed as an owner of each of them—including the three upon which foreclosure was attempted. There was no ambiguity in the notice at all.

If the Water District's counsel had the slightest doubt about the truth of the State's tax foreclosure petition, he should have made inquiry—and he made none.

Obviously, where land is being foreclosed upon and the taxing body, as here, knows of a claim of ownership, they must make that person (or his heirs) parties to the suit if they are to foreclose that claim of ownership. *Schroeder v. New York*, 371 U.S. 208.

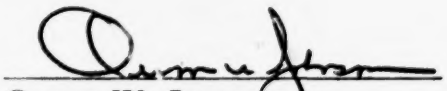
Due process was denied in this case, and the District did not join Joseph A. Collins or—if they knew him—his heir, William Collins—or—if they did not know William—then the unknown heirs as Defendants in this suit.

Not having done this, the interest stands unforeclosed simply because due process was not met by joinder of proper parties.

CONCLUSION

This Court should grant certiorari and the Judgment below should be reversed with a determination that the foreclosure proceeding was invalid and that Respondents were not innocent of its infirmity. As to the unresolved damage issues, the case should be returned to the Texas Court of Civil Appeals.

Respectfully submitted,

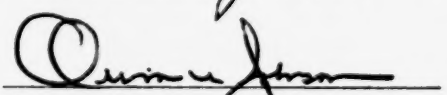


ORRIN W. JOHNSON,
Attorney for Petitioner,
Mary Ellen Coakley, a Widow

JOHNSON & DAVIS
130-38 Texas Reserve Bldg.
Harlingen, Texas 78550

CERTIFICATE

I, Orrin W. Johnson, do hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari has been served upon Respondent, F. M. Reising (whose attorney has withdrawn), at 310 West Fay, Edinburg, Texas 78539, and E. G. Henrichson, of Henrichson & Bates, P. O. Box 117, Edinburg, Texas 78539, counsel for remaining Respondents, by depositing a copy of said Petition in the United States Post Office, first class postage prepaid, this 12th day of February, 1971.



ORRIN W. JOHNSON

APPENDIX A

NUMBER 548

IN THE

Court of Civil Appeals

FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT
OF TEXAS SITTING AT CORPUS CHRISTI, TEXAS

MARY ELLEN COAKLEY, Appellant

v.

V. N. CROW, ET AL, Appellees

On appeal from the 93rd District Court of Hidalgo County, Texas.

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457 S.W.2d 431

OPINION

GREEN, Chief Justice.

Mary Ellen Coakley, appellant, sued F. M. Reising and others in trespass to try title to recover a seventy acre tract of land in Hidalgo County, Texas. She also sued Sarah H. Conklin and others to recover a tract of about thirty-eight acres, also in Hidalgo County. The two cases were tried

together in a jury trial, since they concern the same chain of title. Plaintiff Coakley claims title by reason of (1) a 1941 deed from Mattie Page Coffin (wife at the time of his death of the common source, James R. Page, deceased) and her husband Erle B. Coffin to Joseph M. Collins, (2) Joseph Collins' devise of the property to Will Collins, and (3) a 1943 deed from Will Collins to plaintiff. The defendants are in possession and claim by force of a 1942 default judgment of foreclosure by Hidalgo Water District No. 1 and a constable's deed to the District. The Water District then conveyed the two tracts of land to the defendants or their predecessors in title. The District's foreclosure suit was brought against Mattie Page Coffin and her sons, they being the record owners in 1942 of the property since the deed from Mrs. Coffin and husband to Joseph Collins was not at that time of record. Will Collins, the devisee under Joseph M. Collins' will, was not named as a party to the foreclosure suit. See, on former appeal, Coakley v. Reising, et al, Tex. Sup., 436 S.W.2d 315.

This cause has been pending in the courts since 1947. Three trials have taken place. The Reising case was tried before the court on title issues in September, 1949, resulting in a judgment for the plaintiff which, however, was set aside on plaintiff's motion. The cases remained on the docket for many years, and were tried jointly in May, 1966. At the end of this trial the case was dismissed before submission of special issues to the jury when defendants' motion that plaintiff had sued in the wrong capacity was sustained. Upon appeal, this judgment was set aside by the Supreme Court and the case was remanded for trial. Coakley v. Reising, et al, supra.

Upon the instant trial, a take nothing judgment was entered by the trial court on October 29, 1969, based upon

jury findings. Plaintiff's motion for new trial was overruled and the case is now before this Court on appeal.

The history of the events out of which the litigation arose, and the contentions of the parties as to their respective claims of title, are set forth in Judge Pope's opinion on the former appeal, 436 S.W.2d at pp. 316-317, to which reference is here made. Any additional facts or matters of evidence will be discussed under the pertinent points of error.

Appellant-plaintiff Coakley contends (1) that the Water District officials had actual notice as a matter of law of the Collins' title and that the evidence was legally and factually insufficient to raise an issue of fact of the absence of such notice, and (2) that the judgment of foreclosure was illegal and void.

Appellant also asserts various errors in connection with the court's charge, in the rulings on introduction of evidence, and she also raises the claim of jury misconduct.

Appellant's first two points of error assert in substance that the evidence proved as a matter of law that officials of the Water District had notice that Mattie Page Coffin had conveyed the lands in question to J. M. Collins, and that the jury findings to the contrary did not find support in the evidence, and were contrary to the overwhelming weight of the evidence. To these points appellees reply that the findings of the jury on the notice issues were supported, both legally and factually, by the evidence.

The applicable law with reference to actual notice of an unrecorded title is stated in the Supreme Court's opinion on the former appeal of this case, supra (436 S.W.2d on p. 318) thusly:

"It was Mrs. Coakley's theory that the Water District had actual notice that Will Collins, her predecessor, owned the land even though the title documents were not recorded. She contends the Water District failed to join him in the foreclosure suit, his title was not foreclosed, and the Water District judgment was void as to him.

(3, 4) It is settled by Woodward v. Ortiz, 150 Tex. 75, 237 S.W.2d 286 (1951), and other cases cited in that opinion, that a judgment by a taxing agency is not binding upon a person who is not a party to the suit, when his ownership is evidenced by an unrecorded document, *if the taxing authority has actual or constructive notice of his title or ownership.*[1] Persons actually or constructively known to have an interest in the land should be joined as parties' in a tax foreclosure suit. 54 Tex. Jur. 2d, Taxation, §163; Scales v. Wren, 103 Tex. 304, 127 S.W. 164 (1910). Unless this is the rule, the taxing authority could bring suit and serve process, as plaintiffs contend was done in this case, upon those who have already parted with title and are not the least interested in the suit. Hunt v. State, 110 Tex. 204, 217 S.W. 1034 (1920)."

Of course there were no jury findings on the issue of notice in the former trial, since the suit was ordered dismissed by the trial court before submission of the jury. The Supreme Court, in overruling requests of both parties to decide the issue of notice as a matter of law and render judgment, held, in addition to its holding that the plaintiff could sue in her individual capacity, that the evidence then before the Court created jury fact issues on the question of notice, and reversed and remanded.

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1. Emphasis added. No contention of constructive notice is made by appellant.

On the trial from which the instant appeal was taken, the jury returned negative answers to all special issues inquiring whether, from a preponderance of the evidence, they found that certain named Water District officials or either of them had actual notice in law, as that term was defined in the charge, of the deed from Mrs. Mattie Page Coffin to J. M. Collins, and (separate issues) whether such officials had such notice that Will Collins was successor in interest of Mrs. Page and J. M. Collins to the lands in question. We find, from a study of the briefs and the statement of facts, that such findings have support in the evidence, and are not contrary to the great weight and preponderance of the evidence.

[1] Will Collins, prior to the filing of the foreclosure suit, had made a trip to Hidalgo County, and there was evidence that he had shown interest in certain properties, and that he had conversed with officials of the district about some of the land. However, such evidence did not more than raise fact issues as to any claimed conversation with District officials about any title interest in the property in question, since any knowledge of any conversations of any title claims by Collins was denied by the officials involved. Correspondence between the Collins and District was in evidence, but we do not construe such correspondence as informing District or its officials of any title claims to this land.

[2] As conclusively establishing as a matter of law notice of Collins' claims of title to these tracts, appellant relies principally on proof of a tax suit brought by the State of Texas on December 22, 1941, against various defendants including J. M. Collins on seven tracts of land, including, among others the tracts here involved. The

Water District was named as a defendant, and executed a waiver of service and acknowledgment of a receipt of a copy of plaintiff's petition. Although this was evidence to be considered along with other testimony of notice by the District of Collins' ownership, it did not establish such notice as a matter of law. See discussion on former appeal, supra, 436 S.W.2d on p. 318. Collins had nothing on record in Hidalgo County to evidence any claim of title. He had exercised no rights of possession of the property. Other tracts besides the ones here involved and other defendants besides Collins, were included in the State's suit, and there were no allegations of any claim of title by any specific defendant to any specific tract. There was evidence that the names of other defendants did not appear anywhere in the chain of title to the property which is the subject of the instant case.

[3] Notice is, ordinarily, a fact issue, and does not become a question of law unless the facts are such as to require the law to recognize that notice exists as a matter of law. Under the record presented here, it was a fact issue before the trial court, and that court properly submitted such fact issue to the jury. Appellant's first and second points are overruled.

By her third and fourth points of error, and by her Second Reply Point in her Reply Brief, appellant makes the contention that the foreclosure of District's tax lien was illegal and the judgment and sale was void because (a) it was a foreclosure *in solido* of three different liens in differing amounts on three different pieces of land owned by one not a party to the suit, and (b) because the sale was tainted by a champertous agreement between defendants and District.

[4] As to (a) above, the fact that the one judgment foreclosed on several tracts and ordered them sold in satisfaction of the three different tax liens, i.e. a foreclosure in solido of the tax liens, constituted error, and the judgment would have been subject to reversal on direct appeal. McPhaul v. Byrd, Tex. Civ. App., 174 S.W. 644, n.w.h.; Snell v. Knowles, Tex. Civ. App., 87 S.W.2d 871, 878, wr. dism.; Livingston v. Stubbs, Tex. Civ. App., 151 S.W.2d 285, wr. dis. cor. judg. But such judgment is not void, and is not subject to collateral attack. Snell, supra; Livingston, supra.

We have carefully considered all of the evidence and appellant's points bearing on appellant's claim of illegality in the foreclosure suit, having considered that applying to (a) above and (b) concerning the champerty allegations. It is our conclusion that appellant's points of error 3 and 4 are not well taken, and both are overruled.

[5] We find the evidence sufficient, legally and factually, to support the jury's findings that the defendants were purchasers for value of the property here involved, and the jury did so find. Appellant's contentions to the contrary are overruled.

[6] Appellant, in her seventh point, asserts error in the trial court's definition of "actual notice in law" given in the charge to the jury. The court's definition read:

> "In connection with this Charge, you are further instructed that by the term 'actual notice in law' as used herein, is meant either that he had actual knowledge thereof or that he had knowledge and information of such facts as would put a reasonably prudent person upon inquiry as to whether he was making any claim, from which inquiry, if made, he would have ascertained the facts as to the claim."

Appellant objected to this definition on the grounds among others that it is incomplete, fails to state that the means of knowledge are equivalent to knowledge itself, and fails to state that under notice in law is meant those things which one sought to be charged has express information, and those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed. Appellant also requested that the following definition be given:

> "In common parlance 'actual notice' generally consists in express information of a fact, but in law the term is more comprehensive. In law whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand, which is pursued by the proper inquiry the full truth might have been ascertained. Means of knowledge with the duty of using them are in equity equivalent to knowledge itself. Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge. So that, in legal parlance, actual knowledge embraces those things of which the one sought to be charged has express information, and likewise those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed."

We quote from Champlin Oil & Refining Company v. Chastain, Tex. Sup., 403 S.W.2d 376, on p. 388, as follows:

> "It has been determined by Texas authority that imputed actual notice carries with it the same legal consequences as conscious knowledge. In Hexter v. Pratt, 10 S.W.2d 692, (Tex. Com. App. 1928) it was said:

'Notice in law is of two kinds—actual and constructive. * * * In common parlance "actual notice" generally consists in express information of a fact, but in law the term is more comprehensive. In law whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand, which if pursued by the proper inquiry the full truth might have been ascertained. Means of knowledge with the duty of using them are in equity equivalent to knowledge itself. * * * *So that, in legal parlance, actual knowledge embraces those things of which the one sought to be charged has express information, and likewise those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed.*"[2]

The Hexter case was cited with approval by this Court in Woodward v. Ortiz, 150 Tex. 75, 237 S.W.2d 286 (1951), wherein it was said:

'It may well be, however, that the tax attorney and the County were charged with actual notice of the judgment even though they had no express knowledge thereof. Actual notice "embraces those things of which the one sought to be charged has express information, and likewise those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed." ' "

See, also, Kerby v. Ogletree, Tex. Civ. App., 313 S.W.2d 325, 327, wr. ref. n.r.e.

We hold that the necessary elements of "actual notice" were included in the definition given by the trial court, and overrule appellant's seventh point.

[7, 8] Appellants' eighth and ninth points assert jury misconduct of a prejudicial nature. These contentions were

2. Emphasis added.

made in an affidavit of one of the jury asserting at some length that he and other jurors did not understand and wrongfully applied the definition of "actual notice" contained in the court's charge and appellant's point is based on her asserted error in such definition and the jury's misapplication thereof. The court sustained appellees' special exceptions to the affidavit, and declined to hear testimony. A juror is not guilty of misconduct when, without bringing to the attention of the jury law or facts outside of the record, he misconstrues a portion of the court's charge and argues a misinterpretation to other jurors. Compton v. Henrie, Tex. Sup., 364 S.W.2d 179, 182; Transamerica Insurance Company v. Beseda, Tex. Civ. App., 443 S.W.2d 915, 919, wr. ref., n.r.e. We have held that there was no error in the court's definition. The eighth and ninth points of error are overruled.

Appellant's tenth point of error reads:

> "The Trial Court erred in admitting the hearsay testimony from a former trial of Defendant, F. M. Reising, when Reising was not shown to be dead or disabled and was, in fact, a resident of Edinburg, Texas, since Plaintiff was, thus, denied the opportunity to cross-examine Reising concerning his champertous agreements with the District—a crucial fact which had been discovered since he had testified and been excused at the former trial."

The record establishes that at the time of the 1966 and the 1969 trials F. M. Reising, a resident of Hidalgo County, Texas, had no interest in the property or in the law suit. He and the plaintiff had long theretofore settled all of their claims against each other, and Reising remained in the case only as a nominal party. He had testi-

fied in both the 1949 and 1966 trials. A subpoena was issued for his attendance in court as a defense witness ten days prior to the day the case was set for trial in 1969, but was not served due to his absence from his home county of Hidalgo County, Texas, and from the State. Plaintiff had also secured a subpoena, which was likewise unserved. The case was called for trial in October, 1969, defendants requested a postponement, stating that Reising was a necessary defense witness, and that he was and would be for the next ten days out of the State of Texas. The request for postponement was denied.

The court permitted defendants to introduce into evidence portions of the testimony given by Reising over appellant's objections that the evidence was hearsay and self-serving, that the witness was not shown to be dead, insane, physically unable to testify, or residing outside of the jurisdiction of the court; and that the introduction of the former testimony would deprive the appellant of his right of full cross-examination. It is undisputed by appellees that the witnesses' evidence was very material and necessary to their defense, particularly on the issue of notice.

The rule concerning the admissibility of such testimony is stated in White v. Natural Gas Pipeline Company of America, Tex. Sup., 444 S.W.2d 298, on p. 302, as follows:

> "For testimony given by a witness at a former trial to be admissible in a subsequent trial between the same parties in a civil case, Texas courts make three requirements. (1) The former trial must have been on substantially the same issues. (2) At the former trial there must have been an opportunity for cross-

> examination. (3) The witness at the time of the subsequent trial must have been unavailable to testify. The latter is established when it is shown that the witness is dead or insane or physically unable to testify or is beyond the jurisdiction of the court, or that his whereabouts are unknown and that a diligent search has been made to ascertain his whereabouts or that he has been kept away from the trial by the adverse party. The trial court's exercise of discretion in admitting testimony at the former trial is limited to a determination of the factual predicate. Each and every one of these requirements is essential in establishing the proper predicate for the admissibility of the transcript of testimony in another trial. Houston Fire & Casualty Insurance Co. v. Brittian, 402 S.W. 2d 509 (Tex. Sup. 1966); Lone Star Gas Co. v. State, 137 Tex. 279, 153 S.W.2d 681 (1951). * * *"

[9] Under the facts shown to the trial court, all three of the above named requirements were present when he overruled appellant's objections to the introduction of this evidence. The trial in 1969 was on substantially the same issues as the former trial. The claim of illegality of the tax judgment due to alleged champerty was an issue in the 1966 trial. The transcript does not contain any amended pleadings filed by either party since the former trial.[3] Appellant was shown to have opportunity for cross-examination on all matters included in the testimony, which right was fully exercised. The witness was shown to have been outside of the State of Texas and beyond the jurisdiction of the court, and there was no effort made to prove that his absence was caused or joined in by any of appellees having an interest in the law suit. The trial court

3. There was a motion for summary judgment filed by plaintiff in 1969, which was overruled.

did not err in overruling appellant's objections to the introduction of this evidence. Appellant's tenth point of error is overruled.

[10] Appellant's last eleven points of error (Nos. 11-21 incl.) deal with the special issues in the court's charge inquiring of the damages and rental value of the property during the period of appellees' possession and use thereof. Any recovery by appellant of such damages and rental value would depend upon their securing judgment of title to the property. Since the judgment of title is against them, error, if any, in these issues and the jury's answers to them becomes moot and harmless, and we would not be justified in reversing the judgment for such error, if any. Rule 434, T.R.C.P.; Owens v. Rogers, Tex. Sup., 446 S.W.2d 865. These points of error are overruled as showing no reversible error.

Judgment affirmed.

Opinion delivered and filed this
the 23rd day of July, 1970.

APPENDIX B

IN THE

Supreme Court of Texas

NO. B-698

MARY ELLEN COAKLEY, Petitioner,

v.

F. M. REISING, ET AL., Respondents

and

MARY ELLEN COAKLEY, Petitioner,

v.

SARAH H. CONKLIN, ET AL., Respondents

From Hidalgo County, Thirteenth District.

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436 S.W.2d 315

POPE, Justice.

Mary Ellen Coakley, a widow, sued F. M. Reising and others in trespass to try title to recover a seventy-acre tract of land in Hidalgo County. She also sued Sarah H. Conklin and others to recover a tract of about thirty-eight

acres in Hidalgo County. The two companion cases were tried together before a jury, since they concern the same chain of title. At the conclusion of the evidence, defendants presented an oral motion that the cases be dismissed because the plaintiff had sued individually and not in her capacity as administratrix of the Estate of Joseph M. Collins. The trial court granted the motion, denied plaintiff's motion to reinstate, refused to allow trial amendments and denied plaintiff's motion to permit the introduction of further evidence. The court of civil appeals affirmed the judgments of the trial court. 422 S.W.2d 502. We reverse the judgments of the courts below and remand the causes to the trial court for trial.

Plaintiff's actions assert that the defendants obtained title to the tracts through a void foreclosure proceeding brought by the Hidalgo Water District No. 1. Both plaintiff and defendants insist that they are entitled to judgment, in the event we hold, as we do, that the cases were improperly dismissed. Plaintiff, Mrs. Coakley, claims title to the lands by reason of (1) a 1941 deed from Mattie Page Coffin and husband to Joseph M. Collins, (2) Collins' devise of the property to Will Collins, and (3) a 1943 deed from Will Collins to plaintiff, Mrs. Coakley. The defendants are in possession and claim by force of a 1942 judgment of foreclosure by the Hidalgo Water District No. 1 and constable's deeds to the Water District. The Water District then conveyed the two tracts of land to the defendants or their predecessors in title. It is conceded that the Water District's foreclosure suit was brought against Mrs. Coffin and her sons who were the record owners in 1942, since the deed from Mrs. Coffin to Joseph M. Collins was not then recorded. Will Collins, the devisee under Joseph M. Collins' will was not named as a de-

fendant in the Water District's foreclosure suit. Plaintiff, Mrs. Coakley, contends that the Water District had actual notice of Joseph M. Collins' ownership and also of Will Collins' ownership at the time of the foreclosure proceedings. By reason of the failure to name Will Collins as a defendant plaintiff contends the judgment of foreclosure was void. The history of the events out of which the suit arose is as follows:

1. The parties agree, for purposes of the trial, that James R. Page is the common source. He died testate in Kansas City in 1934 leaving his estate to his widow, Mattie, and his two sons, Phillip and James. In 1939 Mattie married Erle B. Coffin.

2. On March 22, 1941, the two Page boys conveyed their interest in the lands in suit to their mother, Mrs. Coffin. Their deed recited, "It is agreed that the above described property is to be conveyed to Joseph M. Collins by the grantee." On March 24, 1941, Mattie Page Coffin, joined by her husband, Erle Coffin, executed a Missouri warranty deed conveying the lands to Joseph M. Collins. The deed was acknowledged according to the Missouri form and not in the Texas form which then required the wife's separate acknowledgment. The deed was not recorded until 1965.

3. On January 27, 1942, Joseph M. Collins died. He left a will by which he devised his property to his cousin, Will Collins, a resident of Iowa.

4. On August 15, 1942, the Hidalgo Water District No. 1 instituted suit to foreclose the lands for non-payment of the Water District's maintenance and operations charges, also called the flat-rate charges. Non-resident notices were served upon Mattie Page Coffin and her

husband, and the two Page boys. They were the record owners. Will Collins was not named as a party or served with process. On October 21, 1942, the court rendered judgment foreclosing the Water District's flat-rate lien; there was a sale to the Water District and on January 7, 1943, the Water District received a constable's deed to the lands. The Water District then sold the property to the defendants or their predecessors.

5. Mattie Coffin later executed a second deed to correct her 1941 deed which had the defective acknowledgment. It is called a "replacement deed," and as urged by defendants, was executed either on January 19, 1943, or a year earlier as urged by plaintiff, Mrs. Coakley. It was conceded that the deed was not acknowledged until January 19, 1943, but the execution date was disputed. On January 19, 1942, the date plaintiff says the replacement deed was executed, Joseph M. Collins, the grantee, was living. On January 19, 1943, the date of the grantor's acknowledgment of the deed, Collins was dead. The habendum clause in the deed provided "to have and to hold unto the said Joseph M. Collins, and/or his heirs, devisees, legal representatives and assigns forever." The deed was recorded on January 23, 1945.

6. On May 18, 1943, plaintiff, Mrs. Coakley, made application in Texas for the probate of Joseph M. Collins' will which had named Will Collins as devisee and "executrix." The will was admitted to probate in Hidalgo County, Texas on July 28, 1943, but Will Collins did not qualify as executor, so Mrs. Coakley was named administratrix. Her application stated that Joseph M. Collins owed her $2,250. No further orders were entered in the probate proceedings from the date of probate to the time of trial in 1966. The estate was never closed.

7. On June 26, 1943, Will Collins quitclaimed to Mrs. Coakley all of the lands in Texas or elsewhere that he received under Joseph M. Collins' will.

8. In 1947 Mrs. Coakley instituted the present two suits.

We reverse the judgments below because of the error of the trial court in dismissing plaintiff's causes for her failure to sue as administratrix of the estate of Joseph M. Collins, which was still open. Mrs. Coakley, by the deed from Will Collins, was the sole owner of all the lands in Joseph M. Collins' estate. She sued in her individual capacity only. She instituted her suits in 1947 and while the cases were always active, they were not tried until 1966. The defendants did not at any time by exception or plea question plaintiff's capacity to sue nor did they seek to abate the cases. Defendants made no complaint about her as the sole party plaintiff during a pretrial hearing. Rule 166, Tex. Rules Civ. Proc. At the end of an eight-day trial and after both parties closed, the defendants for the first time challenged Mrs. Coakley's right to sue to recover the lands. Defendants orally stated their motion, and its basis was that the administration was not closed and there was no final account which showed all inheritance taxes had been paid. The court granted the oral motion and dismissed the suits.

[1] Whitaker v. McCarty, 221 S.W. 572 (Tex. Com. App. 1920) permitted an owner of the assets of an estate to sue without joinder of the administrator, and while an estate was still open. The court so held for two reasons. One reason was that there was no plea to abate the cause. If such a plea had been timely presented, said

the court, the "administrator could at once have made himself a party in his trust capacity, and would doubtless have done so, * * *" The other reason for permitting the suit without joinder of the administrator was that the case fell within an exception to the general rule that requires the joinder. The exception relied upon was the fact that there were no debts which could be asserted against the property. We reverse the judgments of the courts below for the first reason.

[2] Plaintiff insists that she proved there were no debts which presently exist against the Joseph M. Collins estate for which reason she falls within the exception to the rule which would require her to sue as administratrix. We do not reach that question, but we hold that upon a retrial, proof that there are no debts against the estate and that the purpose of these actions is to preserve rather than destroy the estate will entitle her to sue in her individual capacity. Whitaker v. McCarty, supra; Walker v. Abercrombie, 61 Tex. 69 (1884); 19 Tex. Jur. 2d. Decedent's Estates, §958; See also Chandler v. Welborn, 156 Tex. 312, 294 S.W.2d 801 (1956).

Both the plaintiff and defendants urge that this court should, in the event we reverse the judgments of dismissal, proceed to render proper judgment. We are unable to render the judgments for either the plaintiff or defendants. There is an unsettled fact issue concerning plaintiff's contention that the Water District had actual notice that Joseph M. Collins and Will Collins were the true owners of the property at the time it filed its suit and obtained its judgment. Defendants urge that title had not passed out of Mrs. Coffin to Joseph M. Collins at the time of its suit and judgment, and that they properly sued Mrs. Coffin only.

It was Mrs. Coakley's theory that the Water District had actual notice that Will Collins, her predecessor, owned the land even though the title documents were not recorded. She contends the Water District failed to join him in the foreclosure suit, his title was not foreclosed, and the Water District judgment was void as to him.

[3, 4] It is settled by Woodward v. Ortiz, 150 Tex. 75, 237 S.W.2d 286 (1951), and other cases cited in that opinion, that a judgment by a taxing agency is not binding upon a person who is not a party to the suit, when his ownership is evidenced by an unrecorded document, if the taxing authority has actual or constructive notice of his title or ownership. Persons "actually or constructively known to have an interest in the land should be joined as parties" in a tax foreclosure suit. 54 Tex. Jur. 2d, Taxation, § 163; Scales v. Wren, 103 Tex. 304, 127 S.W. 164 (1910). Unless this is the rule, the taxing authority could bring suit and serve process, as plaintiffs contend was done in this case, upon those who have already parted with title and are not the least interested in the suit. Hunt v. State, 110 Tex. 204, 217 S.W. 1034 (1920).

There is evidence in this record which will support plaintiff's contention, if a fact finder believes it. Will Collins testified that shortly before the Water District filed its foreclosure suit, he went from Iowa to Hidalgo County. This was after Joseph M. Collins' death and was during June and July of 1942. There is evidence that he visited with one or more of the Water District officials and one of them took him out to inspect the properties. There is evidence that the Water District received a letter from Joseph M. Collins in which he informed the District of

his ownership and that the Water District even managed the property for awhile. There is also evidence that Will Collins' visit was the act which precipitated the foreclosure suit, and that the Water District arranged the sale of the property with a designated purchaser even before the institution of its foreclosure suit. The Water District filed its suit in August 1942. If a fact finder should believe from the evidence summarized above that the Water District, at the time it instituted and prosecuted its case to judgment, knew that Mrs. Coffin had conveyed the property and that Joseph M. and Will Collins were her successors in interest, but failed to make Will Collins a party, the foreclosure judgment would be void as to Will Collins. In that event Mrs. Coakley, Collins' grantee, will prevail.

The defendants argue that the Water District through whom they claim did not have to name Will Collins as a defendant because the deed from Mrs. Coffin to Joseph M. Collins was void and title never left Mrs. Coffin who was named as a defendant in the foreclosure suit. The question presented by this contention is whether a married woman's deed to her separate property as the law existed in 1941 was wholly void if it was not privily acknowledged.

In 1941, the time of Mrs. Coffin's deed, Article 1299, Vern. Ann. Tex. Stats., required a married woman to separately acknowledge an instrument which conveyed her separate estate. Humble Oil & Refining Co. v. Downey, 143 Tex. 171, 183 S.W.2d 426 (1944); City of San Antonio v. Grandjean, 91 Tex. 430, 41 S.W. 477, 44 S.W. 476 (1897). The statute has now been repealed. Acts 1963, 58th Leg., ch. 473, p. 1189. The purpose of the requirement for a wife's separate acknowledgment was

the protection of the married woman, her heirs and privies against her careless divestment of title. Savage v. Rhea, 33 S.W.2d 429, 35 S.W.2d 133 (Com. App. 1930). It has, therefore, been held that a stranger to the title may not avail himself of the protection of the statute. Buvens v. Brown, 118 Tex. 551, 18 S.W.2d 1057, 1061-1962 (1929); 1 Tex. Jur. 2d, Acknowledgments § 139; 4 Tex. Practice, Land Titles, § 566, p. 535; Note, 8 Tex. L. Rev. 415. In Buvens v. Brown, supra, the court gave effect to a married woman's deed which was defectively acknowledged when neither she nor her heirs and privies availed themselves of their rights arising out of the defect. The court said:

> "If the statute of 1846 were up for construction on the issue or question of the purpose for which it was enacted, there would be no hesitation in construing it to be an act for the protection and benefit of the married woman and those claiming under her. There would be little hesitation in holding that it was for her protection, and only for her protection; and there would be no reason or inclination to construe it to be a general or omnibus protection for the benefit of any and all who might claim its benefits, be they trespasser or stranger to her title."

[5] Mrs. Coffin and her assigns have never undertaken to avoid the Coffin deed. When we view the situation as it existed at the time the Water District filed its suits and was under the duty of naming Collins as a defendant, but did not do so, it was not in privity with Mrs. Coffin and could not exercise her power on her behalf. The Water District had not then foreclosed on the Coffin land. If the Water District had joined Will Collins as a defendant, the party about which a fact finder may determine it had

actual notice, it may never have acquired an interest in the land. He may have paid the taxes. As stated in Buvens v. Brown, quoted above, "there would be little reason to construe the statute which required the wife's privy acknowledgment to provide a general or omnibus protection for the benefit of any and all who might claim its benefits * * *."

In the event the facts are found against plaintiff on her contention concerning notice, there would still remain one or more disputed fact issues concerning the second or replacement deed that Mrs. Coffin executed. Defendants contend the replacement deed was actually executed and acknowledged in January of 1943 instead of January 1942 and at that time the Water District's foreclosure proceedings had already occurred. They also urge that Erle Coffin's signature on the replacement deed was a forgery. These contentions are disputed. We conclude that the unsettled fact issues preclude our rendering judgments for either plaintiff or defendants.

We reverse the judgments of the courts below and remand the causes to the trial court with instructions to reinstate the causes for trial upon the merits. See, Brown v. Aetna Casualty & Surety Co., 135 Tex. 583, 145 S.W. 2d 171 (1940).

REAVLEY, J., not sitting.

Opinion delivered
December 31, 1968

APPENDIX C

IN THE
93RD JUDICIAL DISTRICT COURT
OF HIDALGO COUNTY, TEXAS

MARY ELLEN COAKLEY

v.

F. M. REISING, ET AL.

NO. B-15,954

MARY ELLEN COAKLEY

v.

SARAH H. CONKLIN, ET AL.

NO. B-15,955

J U D G M E N T

On October 13, 1969, the above entitled and numbered causes having been heretofore consolidated came on to be heard by the Court, and all parties having announced ready, there appeared the Plaintiff, MARY ELLEN COAKLEY, in person and by and through her attorneys of record, Johnson and Davis, and F. M. Reising and Sarah H. Conklin, who are nominal parties to said suit came not in person, but their successors in title, CROW

GRAVEL COMPANY, CROW IRON WORKS, V. N. CROW, A. R. ROGERS, and RIO GRANDE INDUSTRIES, INC., appeared in person and by and through their attorneys of record, and all parties having announced ready for trial, a jury of four good and lawful women and eight good and lawful men were duly impaneled and sworn, and having heard the pleadings, the introduction of testimony began and continued until the 17th day of October, 1969, at which time the jury having heard the argument and the evidence; the argument of counsel, on their oath did, for verdict in response to the following special issues submitted to them by the Court, make the following respective findings:

"SPECIAL ISSUE No. 1.

"Do you find from a preponderance of the evidence that, at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment, F. K. Abney had actual notice in law, as that term is herein defined, that Mrs. Mattie Page Coffin had conveyed the lands here in question to J. M. Collins?

"Answer 'He did have actual notice' or 'He did not have actual notice.'

"We, the Jury, answer: *No, he did not have actual notice.*"

"SPECIAL ISSUE No. 2.

"Do you find from a preponderance of the evidence that, at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment,

F. K. Abney had actual notice in law, as that term is herein defined, that Will Collins was successor in interest of Mattie Page Coffin and J. M. Collins to the lands here in question?

"Answer 'He did have actual notice,' or 'He did not have actual notice.'

"We, the Jury, answer: *No, he did not have actual notice.*"

"SPECIAL ISSUE No. 3.

"Do you find from a preponderance of the evidence that at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment, A. G. Haigh had actual notice in law, as that term is herein defined, that Mattie Page Coffin had conveyed the lands here in question to J. M. Collins?

"Answer 'He did have actual notice,' 'He did not have actual notice.'

"We, the Jury, answer: *No, he did not have actual notice.*"

"SPECIAL ISSUE No. 4.

"Do you find from a preponderance of the evidence, that, at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment, A. G. Haigh had actual notice in law, as that term is herein defined, that Will Collins was successor in interest of Mattie Page Coffin and J. M. Collins to the lands in question?

"Answer 'He did have actual notice' or 'He did not have actual notice.'

"We, the Jury, answer: *No, he did not have actual notice.*"

"SPECIAL ISSUE No. 5.

"Do you find from a preponderance of the evidence, that, at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment, C. I. Haven had actual notice in law, as that term is herein defined, that Mrs. Mattie Page Coffin had conveyed the lands here in question to J. M. Collins?

"Answer 'He did have actual notice,' or 'He did not have actual notice.'

"We, the Jury, answer: *No, he did not have actual notice.*"

"SPECIAL ISSUE No. 6.

"Do you find from a preponderance of the evidence, that, at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment, C. I. Haven had actual notice in law, as that term is herein defined, that Will Collins was successor in interest of Mattie Page Coffin and J. M. Collins to the lands here in question?

"Answer 'He did have actual notice,' or 'He did not have actual notice.'

"We, the Jury, answer: *No, he did not have actual notice.*"

"SPECIAL ISSUE No. 7.

"What amount of money, if any, if paid to the Plaintiff now in cash, do you find from a preponderance of the evidence to be the reasonable net rental value of Lot 2, Section 233, from March 1955 to the date of this trial?

"Answer in dollars and cents, if any, or 'None.'

"We, the Jury, answer: *None.*"

"SPECIAL ISSUE No. 8.

"What amount of money, if any, if paid to the Plaintiff now in cash, do you find from a preponderance of the evidence to be the reasonable net rental value of Lot 14, Section 236, from March 1955 to the date of this trial?

"Answer in dollars and cents, if any, or 'None.'

"We, the Jury, answer: *None.*"

"SPECIAL ISSUE No. 9.

"What amount of money, if any, if paid to the Plaintiff now in cash, do you find from a preponderance of the evidence to be the reasonable net rental value of Lot 15, Section 235, from October 1957 to the date of this trial?

"Answer in dollars and cents, if any, or 'None.'

"We, the Jury, answer: *None.*"

"SPECIAL ISSUE No. 10.

"Do you find from a preponderance of the evidence that Frank Reising had actual notice of the unrecorded deed to J. M. Collins prior to his purchase of the lands in controversy."

"Answer 'Yes' or 'No.'

"We, the Jury, answer: *No.*"

"SPECIAL ISSUE No. 11.

"Do you find from a preponderance of the evidence that the Defendant, Sarah Conklin, had actual notice of the deed to J. M. Collins prior to her purchase of the lands in controversy?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: *No.*"

"SPECIAL ISSUE No. 12.

"Do you find from a preponderance of the evidence that F. M. Reising paid value for the property purchased by him from the water district?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: *Yes.*"

"SPECIAL ISSUE No. 13.

"Do you find from a preponderance of the evidence that Sarah Conklin paid value for the property purchased by her from the water district?

"Answer 'yes' or 'No.'

"We, the Jury, answer: *Yes.*"

"SPECIAL ISSUE No. 14.

"Do you find from a preponderance of the evidence that the Plaintiff and her predecessors in title remained silent when they should have asserted their interest in and to the lands in controversy?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: *Yes.*"

"If you have answered Special Issue No. 14 'Yes,' then answer Special Issue No. 15; otherwise do not answer same."

"SPECIAL ISSUE No. 15.

"Do you find from a preponderance of the evidence that such silence, if you have so found, induced the defendants Reising and Conklin to purchase the property in question?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: *Yes.*"

"If you have answered Special Issue No. 15 'Yes,' then answer Special Issue No. 16; otherwise do not answer same."

"SPECIAL ISSUE No. 16.

"Do you find from a preponderance of the evidence that the Defendants would not have purchased the property in question but for the silence or failure of the Plaintiffs and her predecessors in title to assert their claim?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: *Yes.*"

"SPECIAL ISSUE No. 17.

"Do you find from a preponderance of the evidence that F. M. Reising acted in good faith in purchasing the land in question?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: *Yes.*"

"SPECIAL ISSUE No. 18.

"Do you find from a preponderance of the evidence that Sarah H. Conklin acted in good faith in purchasing the land in controversy?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: *Yes.*"

Such findings were certified to by James C. Shawn, Jr., Foreman of the Jury, as follows:

"We, the Jury, have answered the above and foregoing special issues as herein indicated, and herewith return same into court as our verdict.

/s/ James C. Shawn, Jr.
Foreman"

And such findings were received by the Court and were filed and entered of record in the minutes of the Court.

WHEREUPON Defendants having made and the Court having heard and considered a motion for judgment, and also heard and considered a motion for judgment non obstante veredicto as made by the Plaintiff, the Court made such additional considerations and findings as were author-

ized by the evidence, and the Court being of the opinion that the Defendants' motion for judgment on the verdict should be rendered and that Plaintiff's motion for judgment non obstante veredicto should be overruled, and judgment should be rendered here and now as follows for the Defendants:

It is, therefore, ORDERED, ADJUDGED, and DECREED that Plaintiff take nothing by her said suit against the Defendants, or any of them, and that Plaintiff go hence with her costs and without day.

WHEREUPON Plaintiff, in open Court, duly excepted to the rendition of this judgment and gave notice of appeal to the Court of Civil Appeals for the Thirteenth Supreme Judicial District, sitting at Corpus Christi, Texas.

This judgment is rendered, signed, and entered this 29th day of October, 1969.

_____
JUDGE PRESIDING
93rd District Court
Hidalgo County, Texas

APPROVED:

HENRICHSON & BATES
Edinburg, Texas

By_____
E. G. Henrichson
ATTORNEYS FOR DEFENDANTS

APPROVED AS TO FORM ONLY:

JOHNSON & DAVIS
Harlingen, Texas

By_____
Orrin W. Johnson
ATTORNEYS FOR PLAINTIFF

APPENDIX D

HIDALGO COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NUMBER ONE

C. I. HAVEN, Manager-Engineer
Edinburg, Texas

June 26, 1942.

IN RE: Lot 2-Sec. 233 Tex Mex.

and

Lot 14-Sec. 236 Tex Mex.

Received of F. M. Reising, $100.00 as part payment for the Water District's interest in the above described tracts, subject to forfeit if $1,605.40 balance is not paid in within 30 days after and if the Water District acquires title to this land.

This deposit is accepted on a transaction in which Mr. Reising is proposing to pay a total of $1,705.40 in full settlement of all taxes due on this acreage for the year 1941 and all prior years and Water District Flat Rate Assessments for the flat rate year 1941-42 and all prior years, as well as any court costs and attorney fees which may accrue through the District's efforts to secure title to this acreage through Flat Rate foreclosure. The acceptance of this $100.00 deposit on this transaction is conditioned however, on the possibility of it being possible to reach an agreement with the taxing bodies, other than the Water District to settle their 1941 and prior year tax bills on a prorate basis at the above mentioned figure, if and when the District is able to secure title through the said foreclosure.

In case it is found impossible for the District to secure title to this acreage or a prorate settlement of the taxes at the above figure is found impossible, then Mr. Reising will be refunded the $100.00 here received.

No abstract nor title policy is to be furnished by the District when and if it transfers its interest to Mr. Reising. Such transfer would be made by the District's customary form of Special Warranty Deed. When and if the above outlined transaction should be completed, the persons then occupying this acreage shall have the right to remove their buildings, fences or other removable fixtures which they might have on this acreage within a reasonable time thereafter.

Hidalgo County Water Control
& Imp. Dist. #1.

By_____
Land Commissioner.

STATUTORY APPENDIX

Rule 483. Order on Application for Writ of Error

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused". In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation "Refused. No Reversible Error."

Rule 47. Claims for Relief

A pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain

(a) a short statement of the cause of action sufficient to give fair notice of the claim involved, and

(b) a demand for judgment for the relief to which the party deems himself entitled.

Relief in the alternative or of several different types may be demanded.

SECTION 7. TRESPASS TO TRY TITLE

Rule 783. Requisites of Petition

The petition shall state:

(a) The real names of the plaintiff and defendant and their residences, if known.

(b) A description of the premises by metes and bounds, or with sufficient certainty to identify the same, so that

from such description possession thereof may be delivered, and state the county or counties in which the same are situated.

(c) The interest which the plaintiff claims in the premises, whether it be a fee simple or other estate; and, if he claims an undivided interest, the petition shall state the same and the amount thereof.

(d) That the plaintiff was in possession of the premises or entitled to such possession.

(e) That the defendant afterward unlawfully entered upon and dispossessed him of such premises, stating the date, and withholds from him the possession thereof.

(f) If rents and profits or damages are claimed, such facts as show the plaintiff to be entitled thereto and the amount thereof.

(g) It shall conclude with a prayer for the relief sought.

Rule 788. May File Plea of "Not Guilty" Only

The defendant in such action may file only the plea of "not guilty," which shall state in substance that he is not guilty of the injury complained of in the petition filed by the plaintiff against him, except that if he claims an allowance for improvements, he shall state the facts entitling him to the same.

Rule 789. Proof Under Such Plea

Under such plea of "not guilty" the defendant may give in evidence any lawful defense to the action except the defense of limitations, which shall be specially pleaded.

Rule 804. The Judgment

Upon the finding of the jury, or of the court where the case is tried by the court, in favor of the plaintiff for the

whole or any part of the premises in controversy, the judgment shall be that the plaintiff recover of the defendant the title or possession, or both, as the case may be, of such premises, describing them, and where he recovers the possession, that he have his writ of possession.

Source: Art. 7388, unchanged.

Rule 805. Damages

Where it is alleged and proved that one of the parties is in possession of the premises, the court or jury, if they find for the adverse party, shall assess the damages for the use and occupation of the premises. If special injury to the property be alleged and proved, the damages for such injury shall also be assessed, and the proper judgment shall be entered therefor, on which execution may issue.

Source: Art. 7389 (part). No change.

Rule 806. Claim for Improvements

When the defendant or person in possession has claimed an allowance for improvements in accordance with Articles 7393-7401 of the Revised Civil Statutes of Texas, 1925, the claim for use and occupation and damages mentioned in the preceding rule shall be considered and acted on in connection with such claim by the defendant or person in possession.

Source: Art. 7390, with minor textual change.

Rule 807. Judgment Where Claim for Improvements is Made

Where a claim for improvements is successfully made under Arts. 7393 to 7401 of the Revised Civil Statutes of Texas, 1925, the judgment shall recite the estimated value of the premises without the improvements, and shall also include the conditions, stipulations and directions con-

tained in Articles 7397, 7398 and 7399 of the Revised Civil Statutes of Texas, 1925, so far as applicable to the case before the court.

Source: Art. 7400, with minor textual change.

Rule 111. Citation by Publication in Action Against Unknown Heirs or Stockholders of Defunct Corporations

If the plaintiff, his agent, or attorney, shall make oath that the names of the heirs or stockholders against whom an action is authorized by Art. 2040 of the Revised Civil Statutes of Texas, 1925, are unknown to the affiant, the clerk shall issue a citation for service by publication. Such citation shall be addressed to the defendants by a concise description of their classification, as "the Unknown Heirs of A. B., deceased," or "the Unknown Stockholders of _____ Corporation," as the case may be, and shall contain the other requisites prescribed in Rules 114 and 115 and shall be served as provided by Rule 116.

Article 430 of the Texas Penal Code provides in abbreviated form:

> "Whoever shall for his own profit . . . wilfully instigate, maintain, excite, prosecute or encourage the bringing, in any court of this State, of a suit in law or equity in which he has no interest . . . whether the same shall be done directly by him or through another, shall be fined not to exceed five hundred dollars and may be imprisoned in jail not exceeding three months. The penalties herein described shall apply not only to attorneys at law but to any other person who shall be guilty of the things set forth in this article."

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IN THE

Supreme Court of the United States

October Term, 1970

NO. 1358

MARY ELLEN COAKLEY, *Petitioner*

v.

F. M. REISING, ET AL., *Respondents*

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE 13TH COURT OF CIVIL APPEALS OF TEXAS

B. R. STEWART
212 South Closner
Edinburg, Texas 78539
and
E. G. HENRICHSON
310 South Closner
Edinburg, Texas 78539

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE 13TH COURT OF CIVIL APPEALS OF TEXAS

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Statement

Petitioner's Brief, page 1, states that the suit here involved was a suit for tax foreclosure. This is erroneous. The suit was a flat rate foreclosure, and the foreclosure was made for failure to pay water rate assessments on the land for several years, which assessments are an operation and maintenance assessments. We have again set out in Appendix A, the majority opinion of the Court of Civil Appeals, Appendix B, the Trial Court's Judgment, including the findings of the jury, and in Appendix C, the Texas Recording Statute, which we believe will be of assistance to the Court.

Jurisdiction

Respondents take the position that this Honorable Court does not have jurisdiction of this cause because no federal question is presented. As this Court said in *Waters-Pierce Oil Company v. State of Texas,* 29 Supreme Court Reporter 220:

> "The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities, and privileges of Federal origin, specially set up in the state court, and denied by the rulings and judgment of that court. U. S. Rev. Stat. ss. 709, U. S. Comp. Stat. 1901, p. 575. Nor does this court sit to review the finding of facts made in the state court, but accepts the findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court. Citing cases."

The Supreme Court will not accept jurisdiction unless a substantial federal question is presented. *Honeyman v. Hanan,* 57 Sup. Ct. 350, 300 U.S. 14, *Seaboard v. Watson,* 53 Sup. Ct. 32, 287 U.S. 86, *Zucht v. King,* 43 Sup. Ct. 24, 260 U.S. 174, *Grisanti v. City of Cleveland,* 83 Sup. Ct. 111; 371 U.S. 68, *Lanza v. Wagner* 83 Sup. Ct. 177; 371 U.S. 74.

Respondents submit that this case is an ordinary case involving property rights within the State of Texas. The findings of the Trial Court have resolved the fact issues unfavorably to the Petitioner and this Court, like the Supreme Court of Texas, should not set aside findings

of the jury when such findings have been held to be supported by a sufficiency of the evidence by the Texas Intermediate Court of Civil Appeals.

Petitioner seeks to get jurisdiction of this cause in this Court by giving lip service to the due process and equal protection clauses of the Federal Constitution. Respondents submit that Petitioner has litigated her case through three trials in the State of Texas, and two appeals over a period of some twenty-six years and that the thought of due process or equal protection are afterthoughts on her part only after she has lost her case in the proper tribunals.

Petitioner is not specific in what manner she has been denied due process or the equal protection of the laws under our constitution, and the Appellate Court has failed or refused to certify that a federal question is presented in this cause.

In the case of *Southwestern Bell Telephone Co. v. State of Oklahoma, et al.,* 58 Sup. Ct. Rep. 528, 303 U.S. 206, this Court in discussing the substantial federal question had the following to say:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a Court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

In the case of *Lynch, et al. v. People of New York,* 55 Sup. Ct. Rep. 16, 293 U.S. 52, the Court held that

jurisdiction cannot be determined upon a surmise nor can claim of jurisdiction be sustained by reference to briefs and statements which are not a part of the record, and again, the Court said:

> "Where judgment of the state court rests on two grounds, one involving federal question and the other not, or if it does not appear upon which of two grounds judgment was based, and ground independent of federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

The Supreme Court has no jurisdiction unless a real, not a fictitious, federal question is involved. *McDonald v. Oregon Railroad & Navigation Co.*, 34 Sup. Ct. 772.

To Summarize: Petitioner does not specify the federal question of which she complains and we think that no federal question is raised by the facts. The Appellate Court did not specifically deal with any federal question in its opinion, but disposed of property rights within the state of Texas. The Appellate Court did not certify that any federal question existed in this case. No statute of the state or the effect of any statute on the federal constitution is involved and Respondents wholly fail to perceive any federal question which would warrant this Court in accepting jurisdiction under previous decisions of this court.

We therefore respectfully pray the court to deny the application for the writ of certiorari for lack of jurisdiction.

Statement of the Case

Petitioner alleges in her statement of the case that the Respondents and their predecessors in title were guilty of

covert, champertous and fraudulent arrangements in connection with the Water District's foreclosure procedure which includes the connivings of the parties who were predecessors in title to the Respondents. This statement is not supported by the facts. The Jury found that the predecessors in title to the Respondents were innocent purchasers in good faith of the legal title to the premises and the Texas Court of Appeals held that such findings were supported by the evidence in the case. Petitioner's predecessor in title, the so-called "Iowa hog farmer", never recorded his deed to these lands and premises during his lifetime and the Water District foreclosed their flat rate assessment lien under covenants running with the land against the record owners of the properties, all in accordance with the Texas recording statutes. See Appendix "C", page 37.

J. M. Collins did not record his deed and the Jury found that the Water District had no notice, either actual or constructive of his ownership. Indeed, the evidence shows that J. M. Collins intentionally left his deed off the record, probably with fear that he would be charged with taxes and assessments against the land and he decided to make no claim on the land which might saddle him with so much in delinquent taxes and assessments. He, therefore, purposely or intentionally allowed the Water District to foreclose upon the land without intervention or protest. Now Petitioner herein, his successor in title, seeks to lay claim to the land after the taxes were settled and valuable improvements were made on the property by the purchasers from the foreclosure sale.

The true abstract of title follows this chart.

DATE	THE PLAINTIFF RELIES UPON	THE DEFENDANTS RELY UPON
1-17-27	James R. Page owned land	Same
11-23-24	James R. Page died and will was admitted to probate in Cause No. 1565 in Hidalgo Co. (X010-19) & (X001-9)	Same
11-7-39	Joint request of Mattie A. Phillip E. & James H. Page filed in above probate cause and dividing real estate as follows: To Mattie A. Page - 2/3 To Phillip E. Page - 1/6 To James H. Page - 1/6 (X009A)	Same
8-14-42		Flat Rate Foreclosure Suit (B-13329) filed - (X247-251 incl.)
10-21-42		Judgment entered (X231-2)
12-2-42		Order of Sale issued by District Clerk (X233-6)
1-7-43		Return on order of sale (X237)
1-7-43		Constable's deed to Hidalgo County Water Control & Improvement District No. 1 (X238)
1-18-43		Constable's deed filed for record with County Clerk of Hidalgo County, Texas.

DATE	THE PLAINTIFF RELIES UPON	THE DEFENDANTS RELY UPON
1-28-43		Special Warranty Deed from Hidalgo County W.C.& I.D. No. 1 to Sarah H. Conklin (X-241-3)
2-10-43		Above deed filed for record with County Clerk of Hidalgo County, Texas.
1-28-43		Special Warranty Deed from H.C.W.C. & I.D. No. 1 to F. M. Reising (X244-6)
2-18-43		Above deed filed for record with County Clerk of Hidalgo County, Texas.
1-2-45		Trespass to try title suit (B-14,391) filed by F. M. Reising against H.C.W.C. & I.D. No. 1, et al. and judgment entered in favor of plaintiff on 1-8-45 (X214-20)
1-23-45	Replacement warranty deed (dated 1/19/42 and executed as of 3/24/41) from Mattie Page Coffin (formerly wife of James R. Page, deceased) and husband Erle B. Coffin to Joseph M. Collins filed for record with County Clerk of Hidalgo County, Texas (X026-8)	
3-16-45	Quit-Claim Deed (dated 6/26/43) from William C. Collins to Mary Ellen Coakley filed for record with County Clerk of Hidalgo County, Texas (X087-9)	

DATE	THE PLAINTIFF RELIES UPON	THE DEFENDANTS RELY UPON
3-16-45	Certified copies of Last Will and Testament of Joseph M. Collins and order admitting same to probate in Cause No. 3557, in the County Court of Cameron County, Texas, filed for record with County Clerk of Hidalgo County, Texas (X029-33)	
12-4-45	Quit-Claim Deed (dated 11/27/45) from James H. Page to Mary Ellen Coakley filed for record with County Clerk of Hidalgo County, Texas (X090-1)	
12-4-45	Quit-Claim Deed (dated 11/26/45) from Phillip E. Page to Mary Ellen Coakley filed for record with County Clerk of Hidalgo County, Texas (X092-3)	
11-21-49	Deed (dated 3/22/41) from Phillip E. Page to Mattie Page Coffin filed for record with County Clerk of Hidalgo County, Texas (X020-1)	
11-21-49	Deed (dated 3/22/41) from James H. Page to Mattie Page Coffin filed for record with County Clerk of Hidalgo County, Texas (X022-3)	
8-27-65	Missouri Warranty Deed (dated 3/24/41) from Mattie Page Coffin (formerly wife of James R. Page, deceased) and husband, Erle B. Coffin to Joseph M. Collins, filed for record with County Clerk of Hidalgo County, Texas (X024-5)	

For a concise statement of the facts of the case, see the opinion of Judge Howard P. Green of the Thirteenth Court of Civil Appeals, Appendix "A", page 15.

Petitioner has lost her case in all the state courts. The only question to be resolved in this case was one of notice. Actual notice is a question of fact, and this was answered by the Jury unfavorably to the Petitioner.

Reply to Point Number One

Respondents challenge Petitioner to point out in the record the propositions stated in Point Number One. To begin with, there was no covert acts of private persons to pay for and use the public foreclosure power to seize another man's lands. There was also fair notice and hearing for the record holder of the land for the reason that the municipality had no knowledge of the equitable ownership of the land, if any.

Argument Under Reply to Point Number One

Petitioner complains of unfair notice and says that the land was sold for less than its value and that the landowner had no right to purchase or settle his taxes at $15.00 per acre. The evidence would show that the landowner investigated at the Water District's office and could have received all of the information available if he did not and that he purposely withheld from the Water District's officials notice of his interest in the land.

Petitioner makes a very persuasive argument but her argument does not fit the facts. All persons in Hidalgo

County could settle their taxes for less than the amounts against them but the land in which Petitioner was interested was non-revenue bearing, in brush, overburdened with taxes and considered worthless and was abandoned by the predecessor in title to the Petitioner. This is shown by findings of the jury. See Judgment, Appendix "B", p. 28. Petitioner gets carried away with her rhetoric and makes statements to the effect that no one else had an opportunity to settle taxes for a song and it was unquestionably shown to be a secret private deal for the benefit of strangers to the title. See page 15, Petitioner's Brief. These are wild statements not supported by the facts. The facts were thousands of acres were being foreclosed upon by virtue of delinquent taxes from three governmental subdivisions and they were each filing hundreds of suits and serving each other with notices and each taxing body was waiving and entering appearance in another suit but were intervening in other suits for pro-rata part of the taxes. These suits occurred during the years of the great depression and the district was practically insolvent for inability to collect taxes, the school districts were issuing warrants and were unable to pay teachers, and almost a third of the land of the county were being foreclosed upon in one form or another. All of the people knew that adjustments could be made on taxes because the municipalities were desperate to get the properties back on the active tax rolls. All this is shown on the testimony of Fred K. Abney, Statement of Facts, 251, et. seq. There is not one iota of testimony of any covert arrangements with anyone in the whole record and Petitioner draws all of her inferences from the escrow agreement shown at Appendix D of Petitioner's Brief and also as Exhibits

X-228 and X-229. These escrow agreements, the evidence shows, were entered into with numerous parties concerning any land upon which the District had already foreclosed or was in the process of foreclosing upon which they could find an interested purchaser. From these practical arrangements Petitioner visualizes an unholy alliance of Respondents and contends that the transaction was tainted with fraud.

What Respondents are attempting to say is that they dispute that there is evidence of the proposition that Petitioner assumes in her brief, that is, they dispute that there was: (1) any fraud; (2) any covert arrangements; (3) any champerty; and (4) any attempt to discriminate between persons. In addition to the record, if arguments are set aside, we have the finding of the jury and the approval of the Appellate Court of the findings of these facts.

Again, Petitioner says that the District was renting Collins' land in 1942 and collecting a fee for doing so. See Page 16 of the Petition for Writ of Certiorari. Petitioner does not say where in the Statement of Facts he found this information and we cannot find it. It does appear in the Statement of Facts that the District was renting and endeavoring to make use of non-resident lands that were sitting idle in order that the non-resident owner could realize something from his investment, but we do not find that this is true of any land belonging to Mr. Collins. If the District was renting any lands which may have belonged to Collins, its officers were under the impression that it belonged to the Page Estate.

Reply to Point Number Two

Petitioner under Point Two states that a taxing body who appears as Defendant in a foreclosure suit named as an owner of the land in question has notice of such person's claim, if any, to the title and can not consistently with due process of law foreclose and take such land without making an investigation to determine the heirs or personal representatives of such person.

Argument Under Reply to Point Number Two

In this case it was shown that the State and County as a taxing body filed Suit No. E-719 against the Page Estate and listed one Joseph M. Collins and another Frank Hayes as parties and said suit was filed on seven different tracts of land. It is true that in the seven tracts of land J. M. Collins was listed as a person who might be an owner or claiming an interest but only three tracts of the seven tracts were involved in this suit and the record title to all three tracts showed in the Page Estate. There were altogether five persons listed, Mattie A. Page, Phillip E. Page, James H. Page, Joseph M. Collins, and Frank Hayes. How, then, could a reasonable person know that J. M. Collins had an unrecorded Quit-Claim Deed from the Page Estate to the lands and was keeping such information a secret? Petitioner relies upon this state of facts as a notice as a matter of law and this question was submitted to the Jury under appropriate instruction of the Texas law as to notice. The Jury answered the question unfavorably to the Petitioner as shown in the judgment.

The recording statutes of Texas, see Appendix "C", p. 37, have a specific purpose, i.e., to furnish a place for

a title examiner to look for the claims to the title after an attorney has searched the records and checked with parties in possession and it was only reasonable for an attorney to suppose that he has a list of the proper claimants to the land when he has checked the records in the office of the County Clerk and has made the record title owners parties to the suit. The Jury has found against Petitioner in this regard and this Court ought not to disturb the Jury finding. *Waters-Pierce Oil Co. v. State of Texas, supra.*

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that the application for certiorari be, in all things, denied for the following reasons:

1. Lack of jurisdiction of this Court.
2. Lack of merit in the application.

Respectfully submitted,

B. R. STEWART
212 South Closner
Edinburg, Texas 78539

and

E. G. HENRICHSON
310 South Closner
Edinburg, Texas 78539

By E. G. Henrichson
E. G. HENRICHSON

APPENDIX "A"

NUMBER 548

IN THE COURT OF CIVIL APPEALS
FOR THE THIRTEENTH SUPREME JUDICIAL
DISTRICT OF TEXAS SITTING AT
CORPUS CHRISTI, TEXAS

MARY ELLEN COAKLEY,
Appellant,

V.

V. N. CROW, ET AL,
Appellees.

On Appeal from the 93rd District Court of
Hidalgo County, Texas.

OPINION

Mary Ellen Coakley, appellant, sued F. M. Reising and others in trespass to try title to recover a seventy acre tract of land in Hidalgo County, Texas. She also sued Sarah H. Conklin and others to recover a tract of about thirty-eight acres, also in Hidalgo County. The two cases were tried together in a jury trial, since they concern the same chain of title. Plaintiff Coakley claims title by reason of (1) a 1941 deed from Mattie Page Coffin (wife at the time of his death of the common source, James R. Page, deceased) and her husband Erle B. Coffin to Joseph M. Collins, (2) Joseph Collins' devise of the property to Will Collins, and (3) a 1943 deed from Will Collins to

plaintiff. The defendants are in possession and claim by force of a 1942 default judgment of foreclosure by Hidalgo Water District No. 1 and a constable's deed to the District. The Water District then conveyed the two tracts of land to the defendants or their predecessors in title. The District's foreclosure suit was brought against Mattie Page Coffin and her sons, they being the record owners in 1942 of the property since the deed from Mrs. Coffin and husband to Joseph Collins was not at that time of record. Will Collins, the devisee under Joseph M. Collins' will, was not named as a party to the foreclosure suit. See, on former appeal, Coakley v. Reising, et al, Tex. Sup., 436 S.W.2d 315.

This cause has been pending in the courts since 1947. Three trials have taken place. The Reising case was tried before the court on title issues in September, 1949, resulting in a judgment for the plaintiff which, however, was set aside on plaintiff's motion. The cases remained on the docket for many years, and were tried jointly in May 1966. At the end of this trial the case was dismissed before submission of special issues to the jury when defendants' motion that plaintiff had sued in the wrong capacity was sustained. Upon appeal, this judgment was set aside by the Supreme Court and the case was remanded for trial. Coakley v. Reising, et al, supra.

Upon the instant trial, a take nothing judgment was entered by the trail court on October 29, 1969, based upon jury findings. Plaintiff's motion for new trial was overruled and the case is now before this Court on appeal.

The history of the events out of which the litigation arose, and the contentions of the parties as to their respective claims of title, are set forth in Judge Pope's

opinion on the former appeal, 436 S.W.2d at pp. 316-317, to which reference is here made. Any additional facts or matters of evidence will be discussed under the pertinent points of error.

Appellant-plaintiff Coakley contends (1) that the Water District officials had actual notice as a matter of law of the Collins' title and that the evidence was legally and factually insufficient to raise an issue of fact of the absence of such notice, and (2) that the judgment of foreclosure was illegal and void.

Appellant also asserts various errors in connection with the court's charge, in the rulings on introduction of evidence, and she also raises the claim of jury misconduct.

Appellant's first two points of error assert in substance that the evidence proved as a matter of law that officials of the Water District had notice that Mattie Page Coffin had conveyed the lands in question to J. M. Collins, and that the jury findings to the contrary did not find support in the evidence, and were contrary to the overwhelming weight of the evidence. To these points appellees reply that the findings of the jury on the notice issues were supported, both legally and factually, by the evidence.

The applicable law with reference to actual notice of an unrecorded title is stated in the Supreme Court's opinion on the former appeal of this case, supra (436 S.W.2d on p. 318) thusly:

> "It was Mrs. Coakley's theory that the Water District had actual notice that Will Collins, her predecessor, owned the land even though the title documents were not recorded. She contends the Water District failed to join him in the foreclosure suit, his title was not

foreclosed, and the Water District judgment was void as to him.

(3, 4) It is settled by Woodward v. Ortiz, 150 Tex. 75, 237 S.W.2d 286 (1951) and other cases cited in that opinion, that a judgment by a taxing agency is not binding upon a person who is not a party to the suit, when his ownership is evidenced by an unrecorded document, *if the taxing authority has actual or constructive notice of his title or ownership.*[1] Persons 'actually or constructively known to have an interest in the land should be joined as parties' in a tax foreclosure suit. 54 Tex.Jur.2d, Taxation, §163; Scales v. Wren, 103 Tex. 304, 127 S.W. 164 (1910). Unless this is the rule, the taxing authority could bring suit and serve process, as plaintiffs contend was done in this case, upon those who have already parted with title and are not the least interested in the suit. Hunt v. States, 110 Tex. 304, 217 S.W. 1034 (1920)."

Of course there were no jury findings on the issue of notice in the former trial, since the suit was ordered dismissed by the trial court before submission of the jury. The Supreme Court, in overruling requests of both parties to decide the issue of notice as a matter of law and render judgment, held, in addition to its holding that the plaintiff could sue in her individual capacity, that the evidence then before the Court created jury fact issues on the question of notice, and reversed and remanded.

On the trial from which the instant appeal was taken, the jury returned negative answers to all special issues inquiring whether, from a preponderance of the evidence,

1. Emphasis added. No contention of constructive notice is made by appellant.

they found that certain named Water District officials or either of them had actual notice in law, as that term was defined in the charge, of the deed from Mrs. Mattie Page Coffin to J. M. Collins, and (separate issues) whether such officials had such notice that Will Collins was successor in interest of Mrs. Page and J. M. Collins to the lands in question. We find, from a study of the briefs and the statement of facts, that such findings have support in the evidence, and are not contrary to the great weight and preponderance of the evidence.

Will Collins, prior to the filing of the foreclosure suit, had made a trip to Hidalgo County, and there was evidence that he had shown interest in certain properties, and that he had conversed with officials of the district about some of the land. However, such evidence did not more than raise fact issues as to any claimed conversation with District officials about any title interest in the property in question, since any knowledge of any conversations of any title claims by Collins was denied by the officials involved. Correspondence between the Collins and District was in evidence, but we do not construe such correspondence as informing District or its officials of any title claims to this land.

As conclusively establishing as a matter of law notice of Collins' claims of title to these tracts, appellant relies principally on proof of a tax suit brought by the State of Texas on December 22, 1941, against various defendants including J. M. Collins on seven tracts of land, including, among others the tracts here involved. The Water District was named as a defendant, and executed a waiver of service and acknowledgment of a receipt of a copy of plaintiff's petition. Although this was evidence to be con-

sidered along with other testimony of notice by the District of Collins' ownership, it did not establish such notice as a matter of law. See discussion on former appeal, supra, 436 S.W.2d on p. 318. Collins had nothing on record in Hidalgo County to evidence any claim of title. He had exercised no rights of possession of the property. Other tracts besides the ones here involved and other defendants besides Collins, were included in the State's suit, and there were no allegations of any claim of title by any specific defendant to any specific tract. There was evidence that the names of other defendants did not appear anywhere in the chain of title to the property which is the subject of the instant case.

Notice is, ordinarily, a fact issue, and does not become a question of law unless the facts are such as to require the law to recognize that notice exists as a matter of law. Under the record presented here, it was a fact issue before the trial court, and that court properly submitted such fact issue to the jury. Appellant's first and second points are overruled.

By her third and fourth points of error, and by her Second Reply Point in her Reply Brief, appellant makes the contention that the foreclosure of District's tax lien was illegal and the judgment and sale was void because (a) it was a foreclosure *in solido* of three different liens in differing amounts on three different pieces of land owned by one not a party to the suit, and (b) because the sale was tainted by a champertous agreement between defendants and District.

As to (a) above, the facts that the one judgment foreclosed on several tracts and ordered them sold in satisfaction of the three different tax liens, i.e., a foreclosure

in solido of the tax liens, constituted error, and the judgment would have been subject to reversal on direct appeal. McPaul v. Byrd, Tex. Civ. App., 174 S.W. 644, n.w.h.; Snell v. Knowles, Tex. Civ. App., 87 S.W.2d 871, 878, wr. dism.; Livingston v. Stubbs, Tex. Civ. App., 151 S.W.2d 285, wr. dis. cor. judg. But such judgment is not void, and is not subject to collateral attack. Snell, supra; Livingston, supra.

We have carefully considered all of the evidence and appellant's points bearing on appellant's claim of illegality in the foreclosure suit, having considered that applying to (a) above and (b) concerning the champerty allegations. It is our conclusion that appellant's points of error 3 and 4 are not well taken, and both are overruled.

We find the evidence sufficient, legally and factually, to support the jury's findings that the defendants were purchasers for value of the property here involved, and the jury did so find. Appellant's contentions to the contrary are overruled.

Appellant, in her seventh point, asserts error in the trial court's definition of "actual notice in law" given in the charge to the jury. The court's definition read:

> "In connection with this Charge, you are further instructed that by the term 'actual notice in law' as used herein, is meant either that he had actual knowledge thereof or that he had knowledge and information of such facts as would put a reasonably prudent person upon inquiry as to whether he was making any claim, from which inquiry, if made, he would have ascertained the facts as to the claim."

Appellant objected to this definition on the grounds among others that it is incomplete, fails to state that the means of knowledge are equivalent to knowledge itself, and fails to state that under notice in law is meant those things which one sought to be charged has express information, and those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed. Appellant also requested that the following definition be given:

> "In common parlance 'actual notice' generally consists in express information of a fact, but in law the term is more comprehensive. In law whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand, which is pursued by the proper inquiry the full truth might have been ascertained. Means of knowledge with the duty of using them are in equity equivalent to knowledge itself. Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge. So that, in legal parlance, actual knowledge embraces those things of which the one sought to be charged has express information, and likewise those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed."

We quote from Champlin Oil & Refining Company v. Chastain, Tex. Sup., 403 S.W.2d 376, on p. 388, as follows:

> "It has been determined by Texas authority that imputed actual notice carries with it the same legal consequences as conscious knowledge. In Hexter v. Pratt, 10 S.W.2d 692 (Tex. Com. App. 1928) it was said:

'Notice in law is of two kinds—actual and constructive. * * * In common parlance "actual notice" generally consists in express information of a fact, but in law the term is more comprehensive. In law whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand, which if pursued by the proper inquiry the full truth might have been ascertained. Means of knowledge with the duty of using them are in equity equivalent to knowledge itself. * * * *So that, in legal parlance, actual knowledge embraces those things of which the one sought to be charged has express information, and likewise those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed.*'[2]

The Hexter case was cited with approval by this Court in Woodward v. Ortiz, 150 Tex. 75, 237 S.W.2d 286 (1951), wherein it was said:

'It may well be, however, that the tax attorney and the County were charged with actual notice of the judgment even though they had no express knowledge thereof. Actual notice "embraces those things of which the one sought to be charged has express information, and likewise those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed." ' "

See, also, Kerby v. Ogletree, Tex. Civ. App., 313 S.W.2d 325, 327, wr. ref. n.r.e.

We hold that the necessary elements of "actual notice" were included in the definition given by the trial court, and overrule appellant's seventh point.

Appellant's eighth and ninth points assert jury misconduct of a prejudicial nature. These contentions were

2. Emphasis added.

made in an affidavit of one of the jury asserting at some length that he and other jurors did not understand and wrongfully applied the definition of "actual notice" contained in the court's charge and appellant's point is based on her asserted error in such definition and the jury's misapplication thereof. The court sustained appellees' special exceptions to the affidavit, and declined to hear testimony. A juror is not guilty of misconduct when, without bringing to the attention of the jury law or facts outside of the record, he misconstrues a portion of the court's charge and argues a misinterpretation to other jurors. Compton v. Henrie, Tex. Sup., 364 S.W.2d 179, 182; Transamerica Insurance Company v. Beseda, Tex. Civ. App., 443 S.W.2d 915, 919, wr. ref., n.r.e. We have held that there was no error in the court's definition. The eighth and ninth points of error are overruled.

Appellant's tenth point of error reads:

> "The Trial Court erred in admitting the hearsay testimony from a former trial of Defendant, F. M. Reising, when Reising was not shown to be dead or disabled and was, in fact, a resident of Edinburg, Texas, since Plaintiff was, thus, denied the opportunity to cross-examine Reising concerning his champertous agreements with the District—a crucial fact which had been discovered since he had testified and been excused at the former trial."

The record establishes that at the time of the 1966 and the 1969 trials F. M. Reising, a resident of Hidalgo County, Texas, had no interest in the property or in the law suit. He and the plaintiff had long theretofore settled all of their claims against each other, and Reising remained in the case only as a nominal party. He had

testified in both the 1949 and 1966 trials. A subpoena was issued for his attendance in court as a defense witness ten days prior to the day the case was set for trial in 1969, but was not served due to his absence from his home county of Hidalgo County, Texas, and from the State. Plaintiff had also secured a subpoena, which was likewise unserved. The case was called for trial in October 1969, defendants requested a postponement, stating that Reising was a necessary defense witness, and that he was and would be for the next ten days out of the State of Texas. The request for postponement was denied.

The court permitted defendants to introduce into evidence portions of the testimony given by Reising over appellant's objections that the evidence was hearsay and self-serving, that the witness was not shown to be dead, insane, physically unable to testify, or residing outside of the jurisdiction of the court; and that the introduction of the former testimony would deprive the appellant of his right of full cross-examination. It is undisputed by appellees that the witnesses' evidence was very material and necessary to their defense, particularly on the issue of notice.

The rule concerning the admissibility of such testimony is stated in White v. Natural Gas Pipeline Company of America, Tex. Sup., 444 S.W.2d 298, on p. 302, as follows:

> "For testimony given by a witness at a former trial to be admissible in a subsequent trial between the same parties in a civil case, Texas courts make three requirements. (1) The former trial must have been on substantially the same issues. (2) At the former

> trial there must have been an opportunity for cross-examination. (3) The witness at the time of the subsequent trial must have been unavailable to testify. The latter is established when it is shown that the witness is dead or insane or physically unable to testify or is beyond the jurisdiction of the court, or that his whereabouts are unknown and that a diligent search has been made to ascertain his whereabouts or that he has been kept away from the trial by the adverse party. The trial court's exercise of discretion in admitting testimony at the former trial is limited to a determination of the factual predicate. Each and every one of these requirements is essential in establishing the proper predicate for the admissibility of the transcript of testimony in another trial. Houston Fire & Casualty Insurance Co. v. Brittian, 402 S.W.2d 509 (Tex. Sup. 1966); Lone Star Gas Co. v. State, 137 Tex. 279, 153 S.W.2d 681 (1951). . . ."

Under the facts shown to the trial court, all three of the above named requirements were present when he overruled appellant's objections to the introduction of this evidence. The trial in 1969 was on substantially the same issues as the former trial. The claim of illegality of the tax judgment due to alleged champerty was an issue in the 1966 trial. The transcript does not contain any amended pleadings filed by either party since the former trial.[3] Appellant was shown to have opportunity for cross-examination on all matters included in the testimony, which right was fully exercised. The witness was shown to have been outside of the State of Texas and beyond the jurisdiction of the court, and there was no effort

3. There was a motion for summary judgment filed by plaintiff in 1969, which was overruled.

made to prove that his absence was caused or joined in by any of appellees having an interest in the law suit. The trial court did not err in overruling Appellant's tenth point of error is overruled.

Appellant's last eleven points of error (Nos. 11-21 incl.) deal with the special issues in the court's charge inquiring of the damages and rental value of the property during the period of appellees' possession and use thereof. Any recovery by appellant of such damages and rental value would depend upon their securing judgment of title to the property. Since the judgment of title is against them, error, if any, in these issues and the jury's answers to them becomes moot and harmless, and we would not be justified in reversing the judgment for such error, if any. Rule 434, T.R.C.P.; Owens v. Rogers, Tex. Sup., 446 S.W.2d 865. These points of error are overruled as showing no reversible error.

JUDGMENT AFFIRMED.

/s/ HOWARD P. GREEN
Howerd P. Green,
Chief Justice

Opinion delivered and
filed this the 23rd
day of July, 1970.

APPENDIX "B"

IN THE 93RD JUDICIAL DISTRICT COURT
OF HIDALGO COUNTY, TEXAS

MARY ELLEN COAKLEY

VS.

F. M. REISING, ET AL.

NO. B-15,954

MARY ELLEN COAKLEY

VS.

SARAH H. CONKLIN, ET AL.

NO. B-15,955

JUDGMENT

On October 13, 1969, the above entitled and numbered causes having been heretofore consolidated came on to be heard by the Court, and all parties having announced ready, there appeared the Plaintiff, MARY ELLEN COAKLEY, in person and by and through her attorneys of record, Johnson and Davis, and F. M. Reising and Sarah H. Conklin, who are nominal parties to said suit came not in person, but their successors in title, CROW GRAVEL COMPANY, CROW IRON WORKS, V. N. CROW, A. R. ROGERS, and RIO GRANDE INDUSTRIES, INC., appeared in person and by and through their attorneys of record, and all parties having announced

ready for trial, a jury of four good and lawful women and eight good and lawful men were duly impaneled and sworn, and having heard the pleadings, the introduction of testimony began and continued until the 17th day of October, 1969, at which time the jury having heard the argument and the evidence, the argument of counsel, on their oath did, for verdict in response to the following special issues submitted to them by the Court, make the following respective findings:

"SPECIAL ISSUE No. 1.

"Do you find from a preponderance of the evidence that, at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment, F. K. Abney had actual notice in law, as that term is herein defined, that Mrs. Mattie Page Coffin had conveyed the lands here in question to J. M. Collins?

"Answer 'He did have actual notice' or 'He did not have actual notice.'

"We, the Jury, answer: No, he did not have actual notice."

"SPECIAL ISSUE No. 2.

"Do you find from a preponderance of the evidence that, at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment, F. K. Abney had actual notice in law, as that term is herein defined, that Will Collins was successor in interest of Mattie Page Coffin and J. M. Collins to the lands here in question?

"Answer 'He did have actual notice,' or 'He did not have actual notice.'

"We, the Jury, answer: No, he did not have actual notice."

"SPECIAL ISSUE No. 3.

"Do you find from a preponderance of the evidence that at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment, A. G. Haigh had actual notice in law, as that term is herein defined, that Mattie Page Coffin had conveyed the lands here in question to J. M. Collins?

"Answer 'He did have actual notice,' or 'He did not have actual notice.'

"We, the Jury, answer: No, he did not have actual notice."

"SPECIAL ISSUE No. 4.

"Do you find from a preponderance of the evidence, that, at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment, A. G. Haigh had actual notice in law, as that term is herein defined, that Will Collins was successor in interest of Mattie Page Coffin and J. M. Collins to the lands in question?

"Answer 'He did have actual notice' or 'He did not have actual notice.'

"We, the Jury, answer: No, he did not have actual notice."

"SPECIAL ISSUE No. 5.

"Do you find from a preponderance of the evidence, that at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment, C. I. Haven had actual notice in law, as that term is herein defined, that Mrs. Mattie Page Coffin had conveyed the lands here in question to J. M. Collins?

"Answer 'He did have actual notice,' or 'He did not have actual notice.'

"We, the Jury, answer: No, he did not have actual notice."

"SPECIAL ISSUE No. 6.

"Do you find from a preponderance of the evidence that, at the time Hidalgo County Water Control and Improvement District No. 1 filed its foreclosure suit, No. B-13,329, and prosecuted such suit to Judgment, C. I. Haven had actual notice in law, as that term is herein defined, that Will Collins was successor in interest of Mattie Page Coffin and J. M. Collins to the lands here in question?

"Answer 'He did have actual notice,' or 'He did not have actual notice.'

"We, the Jury, answer: No, he did not have actual notice."

"SPECIAL ISSUE No. 7.

"What amount of money, if any, if paid to the Plaintiff now in cash, do you find from a preponderance of the evidence to be the reasonable net rental value

of Lot 2, Section 233, from March 1955 to the date of this trial?

"Answer in dollars and cents, if any, or 'None.'

"We, the Jury, answer: None."

"SPECIAL ISSUE No. 8.

"What amount of money, if any, if paid to the Plaintiff now in cash, do you find from a preponderance of the evidence to be the reasonable net rental value of Lot 14, Section 236, from March 1955 to the date of this trial?

"Answer in dollars and cents, if any, or 'None.'

"We, the Jury, answer: None."

"SPECIAL ISSUE No. 9.

"What amount of money, if any, if paid to the Plaintiff now in cash, do you find from a preponderance of the evidence to be the reasonable net rental value of Lot 15, Section 235, from October 1957 to the date of this trial?

"Answer in dollars and cents, if any, or 'None.'

"We, the Jury, answer: None."

"SPECIAL ISSUE No. 10.

"Do you find from a preponderance of the evidence that Frank Reising had actual notice of the unrecorded deed to J. M. Collins prior to his purchase of the lands in controversy?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: No."

"SPECIAL ISSUE No. 11.

"Do you find from a preponderance of the evidence that the Defendant, Sarah Conklin, had actual notice of the deed to J. M. Collins prior to her purchase of the lands in controversy?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: No."

"SPECIAL ISSUE No. 12.

"Do you find from a preponderance of the evidence that F. M. Reising paid value for the property purchased by him from the water district?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: Yes."

"SPECIAL ISSUE No. 13.

"Do you find from a preponderance of the evidence that Sarah Conklin paid value for the property purchased by her from the water district?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: Yes."

"SPECIAL ISSUE No. 14.

"Do you find from a preponderance of the evidence that the Plaintiff and her predecessors in title remained silent when they should have asserted their interest in and to the lands in controversy?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: Yes."

"If you have answered Special Issue No. 14 'Yes,' then answer Special Issue No. 15; otherwise do not answer same."

"SPECIAL ISSUE No. 15.

"Do you find from a preponderance of the evidence that such silence, if you have so found, induced the defendants Reising and Conklin to purchase the property in question?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: Yes."

"If you have answered Special Issue No. 15 'Yes', then answer Special Issue No. 16; otherwise do not answer same."

"SPECIAL ISSUE No. 16.

"Do you find from a preponderance of the evidence that the Defendants would not have purchased the property in question but for the silence or failure of the Plaintiffs and her predecessors in title to assert their claim?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: Yes."

"SPECIAL ISSUE No. 17.

"Do you find from a preponderance of the evidence that F. M. Reising acted in good faith in purchasing the land in question?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: Yes."

"SPECIAL ISSUE No. 18.

"Do you find from a preponderance of the evidence that Sarah H. Conklin acted in good faith in purchasing the land in controversy?

"Answer 'Yes' or 'No.'

"We, the Jury, answer: Yes."

Such findings were certified to by James C. Shawn, Jr., Foreman of the Jury, as follows:

"We, the Jury, have answered the above and foregoing special issues as herein indicated, and herewith return same into court as our verdict.

/s/ James C. Shawn, Jr.
Foreman"

And such findings were received by the Court and were filed and entered of record in the minutes of the Court.

WHEREUPON Defendants having made and the Court having heard and considered a motion for judgment, and also heard and considered a motion for judgment non obstante veredicto as made by the Plaintiff, the Court made such additional considerations and findings as were authorized by the evidence, and the Court being of the opinion that the Defendants' motion for judgment on the verdict should be rendered and that Plaintiff's motion for judgment non obstante veredicto should be overruled, and judgment should be rendered here and now as follows for the Defendants:

It is, therefore, ORDERED, ADJUDGED and DECREED that Plaintiff take nothing by her said suit against the Defendants, or any of them, and that Plaintiff go hence with her costs and without day.

WHEREUPON Plaintiff, in open Court, duly excepted to the rendition of this judgment and gave notice of appeal to the Court of Civil Appeals for the Thirteenth Supreme Judicial District, sitting at Corpus Christi, Texas.

This judgment is rendered, signed, and entered this 29th day of October, 1969.

/s/ C. W. LAUGHLIN
JUDGE PRESIDING
93rd District Court
Hidalgo County, Texas

APPROVED:

HENRICHSON & BATES
Edinburg, Texas

By /s/ E. G. HENRICHSON
E. G. Henrichson
ATTORNEYS FOR DEFENDANTS

APPROVED AS TO FORM ONLY:

JOHNSON & DAVIS
Harlingen, Texas

By_____
Orrin W. Johnson
ATTORNEYS FOR PLAINTIFF

APPENDIX "C"

TEXAS REVISED CIVIL STATUTES—Article 6627

All bargains, sales and other conveyances whatever, of any land, tenements and hereditaments, whether they may be made for passing any estate of freehold of inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing; and all deeds of trust and mortgages shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they shall be acknowledged or proved and filed with the clerk, to be recorded as required by law; but the same as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof or without valuable consideration, shall be valid and binding.

CERTIFICATE

I, E. G. Henrichson, do hereby certify that a copy of the above and foregoing Reply to Petition for Writ of Certiorari has been served upon Orrin W. Johnson, of Johnson & Davis, 130-138 Texas Reserve Building, Harlingen, Texas, 78550, counsel for Petitioner, by depositing a copy of said Reply in the United States Post Office, first class postage prepaid, this 9th day of March, 1971.

E. G. Henrichson

E. G. Henrichson

SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
MAR 26 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1358

MARY ELLEN COAKLEY, *Petitioner*

v.

F. M. REISING, ET AL., *Respondents*

REPLY BRIEF OF PETITIONER, MARY ELLEN COAKLEY

ORRIN W. JOHNSON,
Attorney for Petitioner,
Mary Ellen Coakley

JOHNSON AND DAVIS
Attorneys at Law
130-38 Texas Reserve Building
Harlingen, Texas 78550

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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IN THE

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OCTOBER TERM, 1970

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MARY ELLEN COAKLEY, *Petitioner*

v.

F. M. REISING, ET AL., *Respondents*

REPLY BRIEF OF PETITIONER, MARY ELLEN COAKLEY

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Mary Ellen Coakley, files this, her reply to the arguments first raised in the briefs of Respondents, F. M. Reising, et al, in opposition to her Petition for Writ of Certiorari.

Dissenting Opinion of Court Below

The dissenting opinion of the Court below contains information essential to this reply. For this reason, it is appended hereto as Appendix E.

Reply to Respondents' Argument on Jurisdiction

The foreclosure judgment and deeds upon which Respondents stand are invalid and Respondents cannot be innocent purchasers. The opposite conclusions of the Court below are indeed, erroneous conclusions of law, not findings of fact, and they cannot be sustained by the undisputed facts in this record. We will not repeat prior statements except to say that the authority covertly granted by the taxing authority to Respondents to settle taxes and seize title to Collins' land denied the owner of the land the essentials of due process of law. Respondents Reising and Conklin were participants in this arrangement. Neither they nor their pendent assigns can possibly be "innocent" of the illegal arrangement under which they undertook to purchase the land. The Court below simply did not face the embarrassing reasons why the action taken by a Texas municipal corporation was not valid.

Petitioner, in her *Questions Presented* and *Points*, has been specific in stating the manner in which the landowner (in whose shoes she stands) was here denied due process or equal protection of the laws. Essentially due process requires a fair notice to the landowner of *what the transaction is*, an opportunity for a hearing and right to settle taxes equal to that granted by the taxing body to strangers to the title. The uninformative foreclosure suit notice in question (SF X 257, X 247) served by the Water District upon *prior owners* and demanding payment of *all its taxes in full* on the land does not satisfy due process requirements of fair notice to any landowner. In *Walker v. Hutchinson*, 352 U.S. 112, 116, this Court has stated in language more apt than our own:

> *". . . if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests."*

When in fact a tax settlement was made available to Reising and Conklin in mid-1942 at $15.00 per acre, no reason existed why the District should not be required to give the landowner fair notice thereof and a fair and equal right to be heard and, if he chose, to redeem his own land from taxes under the same terms. The Court below approved the jury's rather incredible finding that the District's officials did not have "actual notice" of the ownership of Collins—but this finding—even if correct—nowise answers the due process question. *The taxing body did not attempt to give a fair and informative notice, right of hearing or equal opportunity to any landowner*—even to the Page family, whom it admittedly knew to have been the owner of the land. The real arrangements under which taxes were settled in Respondents' favor and title seized for them were strictly a covert, preferential agreement—with notice of it provided to no one except Reising and Conklin.

There was no valid reason or emergency situation then existing which constitutionally authorized or justified a taking of another man's land in the manner that was done here. To hold otherwise would be to open a wide door to any government to arbitrarily discriminate in tax foreclosure matters as between different citizens and especially against non-resident landowners whose knowledge and opportunities of investigation of activities of local government are apt to be limited.

Reply to Respondents' Statement of the Case

Petitioner recognizes that a more full recitation of the facts of record should await the brief on the record.

Nevertheless, the nature of Respondents' statements compels her to reply to their arguments lest the Court be greatly misled as to what the record does show.

Respondents' statement, regrettably, appears to be replete with erroneous statements of facts as a most cursory reference to the record will plainly disclose. The framing of this argument creates the appearance of some attempt to so misstate facts and thus confuse this overburdened Court to the end that doubt may be created even as to facts which were proven without dispute.

The gist of what Respondents claim is that the evidence shows that the champertous arrangements between the taxing body and Respondents were really open and known to all. Thus, Respondents suggest, fair notice of the champertous arrangements was given to the landowners. Respondents (at page 10) say:

> "*There is not one iota of testimony of any covert arrangements with anyone in the whole record* and Petitioner draws all of her inferences from the escrow agreement shown at Appendix D of Petitioner's Brief and also as Exhibits X-228 and X-229."
>
> . . .
>
> "*What Respondents are attempting to say is that they dispute that there is evidence* of the proposition that Petitioner asumes in her brief, that is, they dispute that there was: (1) any fraud; (2) *any covert arrangements;* (3) *any champerty; and* (4) *any attempt to discriminate between persons. In addition to* the record, if arguments are set aside, *we have the finding of the jury and the approval of the Appellate Court* of the findings of these facts."

In its essence, this claim is completely untrue and quite unsupported by anything in this record. Respondents have

never previously even contended that the District gave any kind of notice of their champertous tax settlement arrangements to Petitioner or to any prior owner of the disputed land. It is undisputed that arrangements were privately made between the taxing body and Respondents. They were all in writing, shown by contracts, receipts and writings kept in the District's files of which the landowner was given no information whatsoever (SF X 206 - 213). Nothing was disclosed by Respondents concerning these covert arrangements in the 1949 trial (SF 339-48; 415-19; 329-339), or even the 1966 trial (SF 323-324) of these same cases. The fact is that throughout all those years Respondents managed to carefully conceal their real arrangements respecting this foreclosure from the landowners, and even from the Plaintiff during years of litigation. This record shows when the accidental discovery of documents disclosing the champertous arrangement occurred—on May 18, 1966. after Respondents, for a second time, had closed their case without revealing their champertous arrangements. (SF 238; 314; See extracts from 1966 Statement of Facts, Paragraph 1, Clerk's Certificate of February 17, 1971).

This record is utterly devoid of any sort of notice of the tax settlements claimed to be imparted to any owner of the disputed lands. Indeed, Respondents never tried to produce any evidence of any regulation or procedure under which fair notice of such arrangements might be given to the landowner.

The majority opinion of the Court below does not really discuss the covert nature of these arrangements. However the dissenting opinion does so, 457 S.W.2d 438, as follows:

> *"First, the plaintiff was denied the opportunity to cross-examine Reising concerning his champertous agreements with the water district. This was where Reising agreed with the water district to do certain things in exchange for a share of a subject matter and this fact was not discovered at the time the witness gave his former testimony.*
>
> . . .
>
> "During the last trial in 1966 he testified as to certain matters respecting his purchase of the land in question. At the end of his testimony he was excused from the trial. *Four days later on the final day of the former trial, written records of the champertous dealings by Reising were found and introduced into evidence. It was undisputed that the plaintiff did not know about these dealings at the time Reising was testifying.* There had been no cross-examination of Reising or inquiry of Reising *respecting these covert arrangements."*

We regret the necessity of presenting this argument, but Petitioner cannot permit Respondents' palpably untrue argument to stand unchallenged. Respondents themselves indirectly concede that Mr. Collins was, at the times in question, ignorant of the availability of tax settlement (at $15.00 per acre) with the taxing body when they say (at page 5):

> ". . . he decided to make no claim on the land which might saddle him with *so much in delinquent taxes and assessments."*

There is nothing in this record that discloses that Collins was offered any sort of an equal opportunity to settle out the delinquent taxes and assessments at the low and preferential figure granted to Respondents.

There are other areas in which Respondents' arguments are subject to correction. For example:

(1) Without citing the record, Respondents broadly state (at page 5) that:

> ". . . J. M. Collins intentionally left his deed off the record, probably with fear that he would be charged with taxes and assessments against the land . . ."

The record shows without dispute that Collins, who died on January 27, 1942, did not conceal his ownership of these Page lands. It is undisputed prior to the August 14, 1942, tax foreclosure suit, J. M. Collins wrote the District contesting the taxes, saying he was interested in the land, threatening action if he lost an acre of it through foreclosure and ". . . do not push me too hard" (X 164). This letter was admittedly received by the District's general counsel who later handled the foreclosure suit (SF 306; 415-417). The immaterial intention ascribed to Collins, if true, is not supported by affirmative evidence.

(2) Respondents state obscurely that, at page 6 et seq. of their brief, they present a "true abstract of title." However, the principal deed dated March 24, 1941, relied upon by Petitioner (SF X-024) is obviously not put in its proper chronological order on page 6 of the so-called abstract. See complete discussion of this deed, 436 S.W.2d 316. It has always been a conceded fact that several of the deeds in Petitioner's chain of title were not timely recorded—but it is also unquestionably true that she owns title to the land unless her title was cut off by the foreclosure judgment under which Respondents claim.

(3) Attempting to evade the question of a lack of notice by the taxing body to the landowner, Respondents (at page 9) state as a fact:

> "The evidence would show that the landowner investigated at the Water District's office and could have received all of the information available if he did not and *that he purposely withheld from the Water District's officials notice of his interest in the land.*"

While the undisputed evidence discloses an investigation by Will Collins, it does not show any concealment of his interest in the land. The converse is true. Two witnesses—one of them an independent witness—testified below that about July 1, 1942, Will Collins told Abney, the duly authorized Land Commissioner (SF 301), that he had "heired" the Page lands and, indeed, showed Abney the March 24, 1941, deed (SF 155; SF 150-152; SF 93). Abney had no independent recollection of the meeting but did not deny that it took place (SF 267-68). Obviously, the burden was not upon the non-resident farmer to surmise the existence of a pending settlement of taxes on his land but rather upon the taxing authority to give him fair notice of this settlement and an equal chance to protect his property.

(4) At page 10, Respondents speak of the land being overburdened with taxes and considered worthless in this light by the predecessor in title to Petitioner. This is true for—we have stated—there were, indeed, $150.00 per acre in taxes against this land at the time in question. But the District officials themselves were the persons who left the impression with Collins that there were more taxes against the land that it was worth (SF 342-345). Obviously, they did not disabuse him of this discouraging thought or in-

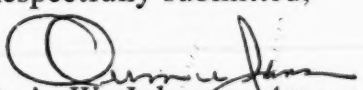
form that taxes had already been settled to the benefit of two strangers to the title at only $15.00 per acre.

(5) Respondents say, at page 10, that these suits occurred "during the great depression. . .". The facts show that the champertous agreements commenced on May 29, 1942 (SF X-205), the flat rate foreclosure suit commenced on August 14, 1942 (SF X-257), and the ultimate deeds to Respondents were on January 28, 1943 (SF X-241-244). The Court itself can draw its own conclusions as to the accuracy of this statement, remembering what happened to land prices during the war years.

Nothing in Respondents' statements or arguments offers any reasonable justification for the refusal of this taxing body to give fair notice of the tax settlement arrangements under which Respondents claim to have acquired their title or to grant an equal right of settlement to the landowner. The foreclosure proceeding was patently unfair, unequal and wanting in due process.

The judgment of foreclosure upon which Respondents' claims to this title depend should be declared invalid but the case must be remanded to the Court below for findings on the damage issues.

Respectfully submitted,



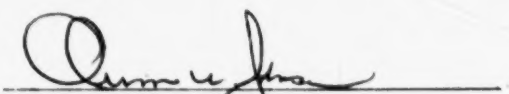
Orrin W. Johnson, Attorney for Petitioner, Mary Ellen Coakley

Address:

JOHNSON AND DAVIS
Attorneys at Law
130-38 Texas Reserve Building
Harlingen, Texas 78550

CERTIFICATE

I, Orrin W. Johnson, do hereby certify that a copy of the above and foregoing Reply Brief of Petitioner, Mary Ellen Coakley, has been served upon Respondent, F. M. Reising (whose attorney has withdrawn), at 310 West Fay, Edinburg, Texas 78539, and E. G. Henrichson, of Henrichson & Bates, P. O. Box 117, Edinburg, Texas 78539, counsel for remaining Respondents, by depositing a copy of said Reply Brief in the United States Post Office, first class postage prepaid, this 25th day of March, 1971.



ORRIN W. JOHNSON

APPENDIX E

NUMBER 548

IN THE

Court of Civil Appeals

FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS SITTING AT CORPUS CHRISTI, TEXAS

MARY ELLEN COAKLEY, *Appellant*

V.

V. N. CROW, ET AL, *Appellees*

On appeal from the 93rd District Court of Hidalgo County, Texas.

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457 S.W.2d 431, at 438

DISSENTING OPINION

NYE, Justice (dissenting).

I respectfully dissent. The majority of this Court by affirming the judgment of the trial court had to approve the hearsay testimony of defendant F. M. Reising. The

facts and the rules relative to the admissibility of the hearsay testimony of a party from a former trial have been fairly set out in the majority opinion of this Court. However, I believe that such evidence did not qualify for admissibility under the rules set down by the Supreme Court in White v. Natural Gas Pipeline Company of America, 444 S.W.2d 298 at 302 (Tex. Sup. 1969) for at least three reasons. First, the plaintiff was denied the opportunity to cross-examine Reising concerning his champertous agreements with the water district. This was where Reising agreed with the water district to do certain things in exchange for a share of a subject matter and this fact was not discovered at the time the witness gave his former testimony. Second, the witness was not "unavailable" to testify as the rule has been defined by the Supreme Court and by other judicial decisions in this State. Third, there was no effort to take the witness' deposition before the trial.

Reising was a party defendant in the law suit. At the time of the present trial he was considered only a nominal party since he and the plaintiff had settled their damage claims against each other. Reising had testified in two prior trials, one of which he was, then, the sole defendant. During the last trial in 1966 he testified as to certain matters respecting his purchase of the land in question. At the end of his testimony he was excused from the trial. Four days later on the final day of the former trial, written records of the champertous dealings by Reising were found and introduced into evidence. It was undisputed that the plaintiff did not know about these dealings at the time Reising was testifying. There had been no cross-examination of Reising or inquiry of Reising respecting these covert arrangements. He did not volunteer such

admission. His credibility as to good faith was not in issue then in the same light as it was in this trial.

The rule is, that statements made in evidence upon a previous proceeding may be received upon a subsequent trial as evidence of the truth of such statements where the witness is unavailable, provided the party against whom the evidence is now offered had the opportunity to cross-examine the witness at the former trial upon the *same issue as that upon which the evidence is now offered.* (emphasis supplied) McCormick and Ray on Evidence, §942, p. 720; Hafer v. Prashner, 413 S.W.2d 759 (Tex. Civ. App.—Corpus Christi 1967) and authorities cited therein. The hearsay evidence relied upon in this trial, was offered to show among other things that Reising had made "good faith" improvements on the land following his purchase. He testified that he had paid the consideration called for in the deed. There was evidence from other witnesses that the amount Reising had paid was extremely low. There was no opportunity to cross-examine Reising relative to the champertous arrangements he had made with the water district relative to such purchase. The evidence was offered by appellees undisputedly to prove at least in part, Special Issue No. 17 inquiring whether or not Reising had acted in good faith in purchasing the land in question, to which the jury answered: "Yes".

It was undisputed that Reising was a resident of Edinburg the county where the case was tried. It was also undisputed that his deposition had never been taken during the 22 years this cause has been pending. Appellees admit that his testimony was vital and very material to their defense. It was undisputed that defendant Reising had gone to Oklahoma on a vacation and would return on

October 20. The defendants issued a subpoena for Reising on October 3 and four days later learned of his absence because of his vacation. On October 13, the day trial commenced, appellees presented their motion for continuance because Reising was absent. This was overruled by the court. Later the trial court admitted Reising's testimony over appellant's objection.

The Court in Morris v. Davis, 292 S.W. 574 (Tex. Civ. App.—Austin 1927, wr. ref.) discussed the various rules that had been formulated by judicial decision based upon the common law. One such rule was that a party does not have the right to prove what a particular witness testified to on a former trial of the case merely because that witness has gone to and resides in another state. He must show in addition, that he cannot procure the evidence of the absent witness by deposition or otherwise. The Court, in discussing the common law rule and testing the basis for its admissibility said: "It is clear beyond dispute that the purpose of the rule requiring the 'whereabouts' of the witness to be unknown, before his former testimony is admissible, was to require the taking of his deposition when his 'whereabouts' is known, even though his residence be beyond the limits of the state. Or, as said by Judge Key, 'conditions which render it reasonably certain that he cannot procure the evidence of the absent witness by deposition or otherwise' should be shown by the party offering it."

The rule relative to the unavailability of a witness to testify where the excuse is that he is "beyond the jurisdiction of the court" must be interpreted to mean that his unavailability from the state is more than temporary. This is true because all of the excuses that are set forth

in the rule are based upon a rather permanent condition: such as 1) whereabouts are unknown and that a diligent search has been made to ascertain his whereabouts; 2) that he has been kept away from the trial by an adverse party; 3) physically unable to testify; 4) insane; 5) dead; and 6) finally beyond the jurisdiction of the court. The Supreme Court in White v. Natural Gas Pipeline Company of America, supra, said each and every one of these requirements is essential in establishing the proper predicate for the admissibility of the evidence. The exercise of discretion by the trial court, is limited by a determination of the sufficiency of the factual predicate in the situation claimed to exist. Houston Fire & Casualty Insurance Company v. Brittian, 402 S.W.2d 509 (Tex. Sup. 1966). There was no evidence before the trial court that the witness' absence beyond the jurisdiction of the court was anything other than temporary. There was no evidence that there had been any attempt to secure the deposition testimony of the absent witness. I would hold the trial court abused its discretion in this respect.

The Supreme Court in the Brittian case, supra, in discussing the Morris v. Davis case, (writ refused) stated: "* * * there was disagreement among members of the court but none questioned the soundness of the rule in Lone Star Gas; Morris v. Davis, * * *" (Emphasis supplied.) and citing other authorities. The court in the White case, supra, in holding that the evidence admitted was error, stated that the deposition of the witness could have been taken but wasn't.

The trial court in this case had only to wait approximately one week for the return of the witness to make

his testimony available in person and subject to cross-examination. The appellee and even the defendant Reising (the absent witness) knew of the trial setting but appellee made no effort to take Reising's deposition. This, of itself, precludes the use of the former testimony. Stohn v. Bryant, 283 S.W.2d 299 (Tex. Civ. App.—Dallas 1955, ref. n.r.e.); Morris v. Davis, supra. Reising's testimony taken from two other trials was clearly secondary evidence. There was no matter of necessity existing in this trial that would compel the trial court to authorize the use of this evidence by appellee.

I would hold that the admission of such testimony under the circumstances of this case was calculated to and probably did cause the rendition of an improper judgment. Houston Fire & Casualty Insurance Company v. Brittian, supra; White v. Natural Gas Pipeline Company of America, supra; and Rule 434, T.R.C.P. The judgment should be reversed and the cause remanded.